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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND FOR THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES PURSUANT
TO SECTION 2284, TITLE 28 UNITED STATES CODE

RALPH COLEMAN, ET AL,)
)
 PLAINTIFFS,)
)
 VS.) NO. CIV S-90-0520 LKK JFM
)
 ARNOLD SCHWARZENEGGER, ET AL,)
) THREE-JUDGE COURT
 DEFENDANTS.)
)

MARCIANO PLATA, ET AL,)
)
 PLAINTIFFS,)
)
 VS.) NO. C 01-1351 TEH
)
 ARNOLD SCHWARZENEGGER, ET AL,)
)
 DEFENDANTS.)
)

TRANSCRIPT OF PROCEEDINGS
SAN FRANCISCO, CALIFORNIA
FEBRUARY 3, 2009

(APPEARANCES ON FOLLOWING PAGE)

REPORTED BY: DEBRA L. PAS, CSR 11916, CRR, RMR, RPR
OFFICIAL REPORTER - US DISTRICT COURT
COMPUTERIZED TRANSCRIPTION BY ECLIPSE

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17 **FOR SONOMA COUNTY** COUNTY OF SONOMA
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20 **FOR THE COUNTY OF** OFFICE OF MICHAEL P. MURPHY
SAN MATEO COUNTY COUNSEL, SAN MATEO COUNTY
 21 **INTERVENORS:** HALL OF JUSTICE AND RECORDS
 400 COUNTY CENTER, 6TH FLOOR
 22 **REDWOOD CITY, CALIFORNIA 94063-1662**
BY: CAROL L. WOODWARD, ESQUIRE

23

24 - - - -

25

P R O C E E D I N G S

1
2 **FEBRUARY 3, 2009**

10:03 A.M.

3
4 **THE CLERK:** CALLING CIVIL CASE NO. C01-1351 PLATA
5 VERSUS SCHWARZENEGGER. CALLING CIVIL CASE NO. S-90-0520,
6 COLEMAN VERSUS SCHWARZENEGGER.

7 APPEARANCES, PLEASE, COUNSEL.

8 **MR. SPECTER:** DONALD SPECTER FROM THE PRISON LAW
9 OFFICE FOR THE PLAINTIFFS.

10 **MR. BIEN:** MICHAEL BIEN, ROSEN, BIEN & GALVAN, FOR
11 THE COLEMAN PLAINTIFF CLASS.

12 **MS. LEONARD:** NATALIE LEONARD, CARROLL, BURDICK &
13 MCDONOUGH FOR THE CALIFORNIA CORRECTIONAL PEACE OFFICERS
14 ASSOCIATION.

15 **MR. MELLO:** PAUL MELLO, HANSEN BRIDGETT, ON BEHALF OF
16 THE PLATA DEFENDANTS, ALONG WITH ANNE JOHNSON FROM MY OFFICE.

17 **MR. TILLMAN:** GOOD MORNING. LISA TILLMAN ON BEHALF
18 OF THE COLEMAN DEFENDANTS FROM THE OFFICE OF THE ATTORNEY
19 GENERAL.

20 I'M HERE WITH KYLE LEWIS, THE DEPUTY ATTORNEY GENERAL
21 FROM THE SAME OFFICE.

22 **MS. BARLOW:** GOOD MORNING, YOUR HONORS. KIMBERLY
23 HALL BARLOW, JONES AND MAYER, ON BEHALF OF THE LAW ENFORCEMENT
24 INTERVENORS.

25 **MR. MITCHELL:** GOOD MORNING. BILL MITCHELL WITH THE

1 RIVERSIDE COUNTY DISTRICT ATTORNEY'S OFFICE ON BEHALF OF THE
2 DISTRICT ATTORNEY INTERVENORS.

3 **MR. KAULFORD:** GOOD MORNING, YOUR HONORS. STEVE
4 KAUFHOLD FROM AKIN, GUMP, STRAUSS, HAUER AND FELD FOR THE
5 LEGISLATOR INTERVENORS.

6 **MS. FUENTES:** GOOD MORNING. THERESA FUENTES FROM
7 SANTA CLARA COUNTY FOR THE SANTA CLARA COUNTY INTERVENORS AND
8 THE COUNTY INTERVENORS.

9 **MS. WOODWARD:** GOOD MORNING, YOUR HONOR. CAROL
10 WOODWARD, COUNTY COUNSEL FROM SAN MATEO ON BEHALF OF THE COUNTY
11 INTERVENORS.

12 **MS. KECK:** GOOD MORNING, YOUR HONOR ANN KECK, DEPUTY
13 COUNTY COUNSEL, ON BEHALF OF THE SONOMA COUNTY INTERVENORS.

14 **JUDGE KARLTON:** FOLKS, BEFORE WE GET STARTED WITH THE
15 ARGUMENT IN GENERAL, THE COURT HAS DEVELOPED SOME ANXIETY.

16 MR. MELLO, WOULD YOU COME TO THE MICROPHONE FOR A
17 MOMENT?

18 DURING THE INTERIM, THE COURT HAD DISCOVERED
19 CALIFORNIA CORRECTION PEACE OFFICERS ASSOCIATION VERSUS
20 SCHWARZENEGGER, 163 CAL. APP. 4802.

21 I DON'T KNOW AND SO I'M ASKING YOU, SIR, ARE YOU
22 FAMILIAR WITH THE CASE AND ARE YOU FAMILIAR WITH THE CONTENT?

23 **MR. MELLO:** I AM NOT. I AM SURE THAT I CAN GET
24 FAMILIAR IN SOME TIME, BUT I AM NOT.

25 **JUDGE KARLTON:** I'M GOING TO TELL YOU, SPEAKING FOR

1 MYSELF, ALTHOUGH I SHARED WITH MY COLLEAGUES MY ANXIETY, IT IS
2 NOT CLEAR TO ME THAT YOU CAN TAKE THE POSITION YOU HAVE TAKEN
3 IN THE TRIAL, AND I URGE YOU TO READ THE CASE AND EXPLAIN TO ME
4 HOW THAT IS POSSIBLE. AND I LOOK FORWARD TO YOUR ARGUMENT,
5 INDEED, WHENEVER YOU ARE READ TO RESPOND.

6 **MR. MELLO:** AND DOES YOUR HONOR MIND POINTING OUT TO
7 MYSELF WHY --

8 **JUDGE KARLTON:** READ THE CASE. YOU WILL BE SHOCKED.
9 READ THE CASE.

10 **MR. MELLO:** OKAY. THANK YOU, YOUR HONOR.

11 **JUDGE REINHARDT:** I'M SAYING THAT THAT SAME
12 SUGGESTION, I ASSUME, APPLIES TO COUNSEL FOR ATTORNEY GENERAL.

13 **JUDGE KARLTON:** ACTUALLY, YOU'RE RIGHT.

14 ALTHOUGH THE CASE SPECIFICALLY DEALS WITH THE
15 GOVERNOR, IT OCCURRED TO ME, MS. TILLMAN, THAT YOU ALSO
16 REPRESENT THE GOVERNOR.

17 **MS. TILLMAN:** YES, YOUR HONOR.

18 **JUDGE KARLTON:** I ASK YOU TO READ THE CASE AS WELL.

19 **MS. TILLMAN:** I WILL DO SO. THANK YOU.

20 **JUDGE REINHARDT:** THANK YOU.

21 GOOD MORNING, EVERYBODY.

22 WELCOME AGAIN TO THIS THREE-JUDGE COURT PROCEEDING IN
23 THIS BEAUTIFUL BUILDING AND BEAUTIFUL COURTROOM. THE ARGUMENTS
24 ARE BEFORE A MIXED COURT AND WHAT IS A RATHER UNUSUAL
25 PROCEEDING INFREQUENTLY HELD.

1 SO I THOUGHT WE MIGHT BEGIN BY EXPLAINING THAT THE
2 ARGUMENTS ALSO ARE SOMEWHAT MIXED. THEY ARE IN BETWEEN WHAT
3 YOU WOULD BE DOING IN A DISTRICT COURT AND WHAT YOU WOULD BE
4 DOING IN A COURT OF APPEALS.

5 IN A COURT OF APPEALS, YOU WOULD GET VERY LITTLE TIME
6 TO SPEAK AND MAINLY BE INTERRUPTED AND REQUIRED TO ANSWER
7 QUESTIONS.

8 THAT DOESN'T MEAN WE INTEND TO LIMIT YOUR TIME. WE
9 CERTAINLY WANT TO HAVE A FULL ARGUMENT OF ALL OF THE ISSUES IN
10 THE CASE, BUT I'M SURE YOU HAVE SEEN FROM THE EARLIER
11 PROCEEDINGS THAT WE DO NOT INTEND TO JUST SIT HERE AND LISTEN.

12 WE ARE INTERESTED IN EXPLORING ISSUES WITH YOU DURING
13 THE CLOSING ARGUMENTS. SO WITH THAT WELCOME AND INTRODUCTION,
14 WE ARE READY TO HEAR THE CLOSING ARGUMENTS.

15 **CLOSING ARGUMENT**

16 **MR. SPECTER:** GOOD MORNING AGAIN. MY NAME DONALD
17 SPECTER FROM THE PRISON LAW OFFICE. AS YOU KNOW, I REPRESENT
18 THE PLAINTIFFS IN THIS CASE.

19 **JUDGE KARLTON:** I'M HAVING A LITTLE TROUBLE HEARING
20 YOU, MR. SPECTER.

21 **MR. SPECTER:** IS THIS BETTER?

22 **JUDGE REINHARDT:** A LITTLE BIT. SPEAK UP.

23 **MR. SPECTER:** OKAY.

24 **JUDGE REINHARDT:** THAT'S BETTER.

25 **MR. SPECTER:** I WILL ADDRESS WHETHER OVERCROWDING IS

1 THE PRIMARY CAUSE OF THE CONSTITUTIONAL VIOLATIONS IN THE PLATA
2 CASE.

3 MY COLLEAGUE, MR. BIEN, WILL SPEAK TO THE SAME ISSUE
4 IN THE COLEMAN CASE.

5 I WILL ALSO ADDRESS WHETHER THERE IS OTHER RELIEF
6 THAT COULD RESOLVE THE CONSTITUTIONAL PROBLEMS AND IF NOT,
7 WHETHER THE COURT SHOULD ISSUE A PRISONER RELEASE ORDER AND IF
8 SO, WHAT THAT PRISONER RELEASE ORDER SHOULD LOOK LIKE.

9 AS YOU MENTIONED, JUDGE REINHARDT, THIS IS A MIX OF
10 DISTRICT COURT AND COURT OF APPEAL PROCEEDINGS. AS SUCH, I DO
11 NOT INTEND TO SUMMARIZE LIKE I WOULD IN A TRIAL. THE
12 FINDINGS -- THE EVIDENCE, ESPECIALLY SINCE WE FILED WHAT I
13 THINK COULD EASILY BE CALLED AN EXHAUSTIVE SET OF FINDINGS OF
14 FACT AND CONCLUSIONS OF LAW WHERE --

15 **JUDGE REINHARDT:** COULD YOU TRY ONCE MORE TO FIX THE
16 MICROPHONE?

17 **MR. SPECTER:** OKAY. SO I DON'T PLAN ON SUMMARIZING
18 THE EVIDENCE IN FULL AGAIN HERE TODAY. INSTEAD, I LOOK FORWARD
19 TO ANSWERING THE QUESTIONS THAT YOU MAY POSE.

20 I WOULD LIKE TO EXPLAIN THE SIGNIFICANCE OF CERTAIN
21 RECENT DEVELOPMENTS AND TO RESPOND TO SOME OF THE POINTS MADE
22 IN THE FINDINGS AND CONCLUSIONS SUBMITTED BY MY COLLEAGUES ON
23 THE OTHER SIDE OF THE CASE.

24 YOU MAY RECALL THAT I CONCLUDED MY OPENING STATEMENT
25 WITH THE VIDEO OF GOVERNOR SCHWARZENEGGER DISCUSSING THE

1 HEALTHCARE CRISIS IN CALIFORNIA'S PRISONS AND THE STATE'S
2 RESPONSE TO THAT CRISIS.

3 HE SAID, QUOTE -- I CAN'T DO IT IN THE SAME WAY, BUT
4 HE SAID:

5 "I DON'T BLAME THE COURTS FOR STEPPING IN TO TRY
6 TO SOLVE THE HEALTHCARE CRISIS THAT WE HAVE, THE
7 OVERCROWDING CRISIS THAT WE HAVE, BECAUSE THE FACT OF
8 THE MATTER IS FOR DECADES THE STATE OF CALIFORNIA
9 HASN'T REALLY TAKEN IT SERIOUSLY. IT HASN'T REALLY
10 DONE SOMETHING ABOUT IT."

11 WELL, RECENT DEVELOPMENTS PROVE ONCE AGAIN THAT THE
12 GOVERNOR WAS RIGHT WHEN HE SAID THOSE REMARKS AND THAT THIS
13 COURT MUST AGAIN STEP IN TO TRY TO SOLVE THE HEALTHCARE CRISIS
14 BECAUSE THE STATE IS INCAPABLE OF DOING SO.

15 RECENT ACTIONS TAKEN BY THE DEFENDANTS, IN OUR
16 OPINION, DESTROY TWO KEY COMPONENTS OF THE STATE'S DEFENSE IN
17 THIS CASE AND LEAVE THEM ONLY WITH THE WEAK ARGUMENT THAT
18 PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PROOF.

19 FIRST, CENTRAL TO THE STATE'S DEFENSE IN PLATA HAS
20 BEEN THE RECEIVERSHIP. DEFENDANTS HAVE ARGUED IN THIS
21 PROCEEDING THAT A PRISONER RELEASE ORDER ISN'T NECESSARY
22 BECAUSE THE RECEIVER HAS BEEN AND WILL CONTINUE TO MAKE
23 IMPROVEMENTS.

24 LAST WEEK, HOWEVER, AS YOU PROBABLY KNOW, THE STATE
25 SOUGHT TO TERMINATE THE RECEIVERSHIP IN A MOTION BEFORE

1 JUDGE HENDERSON.

2 SO DEFENDANTS NOW ARGUE THAT THE VERY RELIEF THAT
3 THEY BELIEVE SHOULD SAVE THEM FROM A PRISONER RELEASE ORDER
4 MUST BE ELIMINATED, NOT, NOT BECAUSE PRISONERS ARE RECEIVING
5 ADEQUATE CONSTITUTIONAL CARE, BUT BECAUSE THE RECEIVERSHIP,
6 THEY CLAIM, IS NOT AUTHORIZED BY THE PLRA SEVERAL YEARS AFTER
7 IT WAS FORMED.

8 SINCE, IT HAS BEEN THE DEFENDANT'S POSITION THAT A
9 RECEIVER IS NOT RELIEF WHICH THIS COURT CAN GRANT. THEY CANNOT
10 ALSO ARGUE THAT THIS IS OTHER RELIEF THAT WOULD REMEDY THE
11 CONSTITUTIONAL VIOLATION IN THIS CASE.

12 AND EVEN IF THE COURT WERE TO CONSIDER SUCH
13 INCONSISTENT POSITIONS, THE RECEIVER'S OPINION THAT CROWDING IS
14 THE PRIMARY CAUSE OF THE HARM MAKES IT CLEAR THAT THIS
15 OPERATION ALONE WILL NOT BE SUFFICIENT TO CAUSE THESE GRAVE
16 CONSTITUTIONAL -- TO CURE THESE GRAVE CONSTITUTIONAL PROBLEMS.

17 SECOND --

18 **JUDGE KARLTON:** MR. SPECTER, I RECOGNIZE THAT THERE
19 IS A QUESTION OF INHERENT AMBIGUITY, BUT -- WELL, OKAY. NEVER
20 MIND. I SEE. OKAY, NEVER MIND. GO AHEAD.

21 **MR. SPECTER:** THANK YOU.

22 SECOND, DEFENDANTS, INCLUDING THE GOVERNOR, HAVE
23 ARGUED THAT ADDITIONAL PRISON CONSTRUCTION THROUGH AB900 AND
24 THE RECEIVER'S 10,000-BED PROJECT WILL RESOLVE THE
25 CONSTITUTIONAL VIOLATIONS.

1 THE GOVERNOR, HOWEVER, HAS VETOED LEGISLATION THAT
2 CONTAINED CLEANUP LANGUAGE NECESSARY TO ALLOW THE AB900 PROCESS
3 TO CONTINUE.

4 AND MR. CATE, ALSO A DEFENDANT IN THIS CASE ALONG
5 WITH THE GOVERNOR, BUT MR. CATE, WHO MADE THE RECEIVER'S
6 10,000-BED PROJECT ONE OF THE CORNERSTONES OF HIS PLAN TO
7 REDUCE CROWDING SOUGHT AND OBTAINED A STAY, PENDING APPEAL,
8 FROM THE NINTH CIRCUIT OF AN ORDER DESIGNED TO ENABLE THE
9 RECEIVER TO CONTINUE THAT VERY PROJECT.

10 THESE RECENT ACTIONS MAKE ONE THING PERFECTLY CLEAR.
11 REGARDLESS OF WHETHER CLEANUP LEGISLATION IS EVER ENACTED OR
12 THE RECEIVER IS ABLE TO PREVAIL ON THE APPEAL FROM
13 JUDGE HENDERSON'S ORDER IN WHICH THE STAY WAS ISSUED, THE COURT
14 CAN HAVE NO CONFIDENCE THAT THE STATE OF CALIFORNIA IS CAPABLE
15 OF SUSTAINING A STRATEGY FOR THE YEARS THAT IT'S GOING TO TAKE
16 TO END THE LIFE-THREATENING CONDITIONS THAT HAVE CONTINUED TO
17 EXIST FOR ALMOST TWO DECADES IN COLEMAN AND THE BETTER PART OF
18 ONE IN PLATA.

19 AS I THINK OUR PROPOSED FINDINGS MAKE CLEAR, THERE
20 SHOULD BE LITTLE DISPUTE THAT CROWDING IS THE PRIMARY CAUSE OF
21 CONSTITUTIONAL VIOLATIONS AT ISSUE HERE.

22 EVERYONE, SAVE PERHAPS DR. THOMAS, ACKNOWLEDGES THAT
23 IT ADVERSELY AFFECTS THE OPERATION OF THE PRISON SYSTEM AND
24 HEALTHCARE IN PARTICULAR. THE ONLY QUESTION BEFORE THIS COURT
25 IS WHETHER IT IS THE PRIMARY CAUSE.

1 THE RECEIVER ANSWERED THIS QUESTION AFFIRMATIVELY AND
2 IN NO UNCERTAIN TERMS WHEN HE STATED IN HIS MOST RECENT REPORT
3 THAT:

4 "OVERCROWDING IS AND WILL CONTINUE TO BE THE
5 PRIMARY CAUSE OF THE STATE'S INABILITY TO DELIVER
6 CONSTITUTIONALLY ADEQUATE CARE."

7 THIS STATEMENT CLEARS UP ANY POSSIBLE AMBIGUITY ABOUT
8 HIS POSITION ON THIS CRITICAL ISSUE.

9 MR. KELSO'S OPINION IS CONSISTENT WITH THE OPINION OF
10 EVERY OTHER EXPERT WHO TESTIFIED IN THIS SUBJECT, SAVE ONE,
11 DR. THOMAS.

12 WHAT THIS MEANS IS THAT THERE ARE SIMPLY TOO MANY
13 PRISONERS TO TREAT IN THE SPACE THAT'S AVAILABLE.

14 AT AVENAL, FOR EXAMPLE, THERE ARE 7,525 PRISONERS IN
15 SPACES DESIGNED FOR 2,320. THERE ARE TOO MANY PRISONERS FOR
16 THE PHYSICIANS AND OTHER CLINICAL STAFF TO CARE FOR.

17 THERE IS A 90 PERCENT VACANCY RATE OF THOSE PRIMARY
18 CARE CLINICIANS IN SOME PRISONS, AND OVERALL THERE IS A
19 27 PERCENT VACANCY RATE FOR PRIMARY CARE CLINICIANS IN THE
20 SYSTEM, WHICH IS SIX PERCENTAGE POINTS HIGHER THAN THE VACANCY
21 RATE WAS IN 2006, SHORTLY AFTER THE RECEIVER STARTED.

22 THERE IS NO ROOM TO HOUSE PRISONERS IN THE PRISON
23 WHERE THEY CAN GET THE CARE THEY NEED BECAUSE THERE ARE TOO
24 MANY PEOPLE IN THOSE PRISONS. THERE ARE TOO MANY MEDICAL
25 RECORDS TO BE WRITTEN, STORED AND RETRIEVED IN A TIMELY MANNER.

1 THERE ARE TOO MANY PRISONERS WHO REQUIRE THE DELIVERY OF
2 MEDICATION.

3 AND AS THE GOVERNOR IMPLICITLY ACKNOWLEDGED IN HIS
4 EMERGENCY PROCLAMATION AND THAT THE CURRENT AND FORMER HEADS OF
5 THE PRISON SYSTEMS OF TEXAS, WASHINGTON, MAINE, PENNSYLVANIA,
6 AND MOST SIGNIFICANTLY CALIFORNIA TESTIFIED, OVERCROWDING IS
7 THE PRIMARY CAUSE OF THE CONTINUING CONSTITUTIONAL VIOLATIONS.

8 THE EVIDENCE IS UNCONTRADICTED THAT PRISONERS ARE
9 MURDERED IN THE DORMITORY SO LARGE THAT NO ONE CAN NOTICE, THAT
10 ANOTHER PRISONER BLED TO DEATH IN A GIGANTIC PRISON DOWN IN THE
11 CENTRAL VALLEY AND ANOTHER ONE STARVED WITHOUT ANYONE NOTICING.
12 STARVED TO DEATH WITHOUT ANYONE NOTICING UNTIL IT WAS TOO LATE.

13 THESE PRISONERS SUFFERED FROM MEDICAL PRACTICES WHICH
14 IN THE RECEIVER'S WORDS ARE, "EXTREME DEPARTURES FROM COMMUNITY
15 STANDARDS OF CARE." AND MOST SHOCKINGLY, NOBODY REALLY KNOWS
16 THE FULL EXTENT OF THE SUFFERING.

17 BUT DR. SHANSKY'S UNCONTRADICTED TESTIMONY MAKES IT
18 CLEAR THAT THE RECEIVER'S MOST RECENT DEATH REVIEW REPORTS
19 FOUND OVER 200 INSTANCES OF EXTREME DEPARTURES OF CARE IN OVER
20 200 CASES. AND THAT THOSE EXTREME DEPARTURES FROM CARE ARE
21 JUST THE TIP OF THE ICEBERG.

22 NOW, WHEN TALKING ABOUT DEATHS, IT IS IMPORTANT TO
23 REMEMBER THAT DEATH IS NOT THE CONSTITUTIONAL STANDARD. THE
24 CONSTITUTIONAL STANDARD IS RISK OF HARM.

25 AND EVEN IF IT WERE THE CONSTITUTIONAL STANDARD, I

1 WANT TO REMIND THE COURT THAT EVEN THOUGH THE MORALITY RATE IS
2 GOING DOWN, THE NUMBER OF DEATHS WHICH WERE POSSIBLY
3 PREVENTABLE IS GOING UP AND THE EXTREME DEPARTURES FROM CARE
4 WHICH GIVE RISE TO THE RISK OF HARM, OF SERIOUS INJURY, ARE
5 EXTREMELY PREVALENT IN THE SYSTEM.

6 DEFENDANT'S MAIN POINT SEEMS TO BE THAT SINCE THERE
7 ARE MANY CAUSES OF THESE PROBLEMS, ONE CANNOT BE THE PRIMARY
8 CAUSE. THE COURT CORRECTLY RESOLVED THIS ISSUE IN ITS ORDER
9 DENYING SUMMARY JUDGMENT, HOLDING THAT THE EXISTENCE OF A
10 PRIMARY CAUSE DOES NOT MEAN THAT IT IS THE ONLY CAUSE.

11 IN FACT, THE PLAIN LANGUAGE OF THE PLRA IMPLIES THE
12 EXACT OPPOSITE.

13 DEFENDANT'S OTHER CLAIM IS BASED ON UNREASONABLE
14 INFERENCES THAT THEY DRAW FROM DR. SHANSKY'S TESTIMONY.
15 DR. SHANSKY TESTIFIED THEORETICALLY THAT, QUOTE, IT'S POSSIBLE
16 AND, QUOTE, IT'S CONCEIVABLE TO PROVIDE ADEQUATE MEDICAL CARE
17 IN OVERCROWDED PRISONS.

18 FROM THIS, DEFENDANTS ASK THE COURT TO FIND THAT
19 OVERCROWDING IS NOT THE PRIMARY CAUSE OF THE CONSTITUTIONAL
20 VIOLATION IN CALIFORNIA'S PRISONS.

21 AS THE COURT NOTED SEVERAL TIMES DURING TRIAL,
22 ABSTRACT TESTIMONY THAT SOMETHING IS POSSIBLE OR CONCEIVABLE IS
23 OF LITTLE VALUE.

24 DR. SHANSKY TESTIFIED WITHOUT QUALIFICATION THAT AT
25 THE CURRENT TIME, OVERCROWDING IN CALIFORNIA'S PRISONS IS THE

1 PRIMARY CAUSE OF THE CONSTITUTIONAL VIOLATIONS. DEFENDANTS'
2 UNREASONABLE INFERENCES ARE INCONSISTENT WITH THAT CLEAR AND
3 DIRECT TESTIMONY.

4 DEFENDANTS ALSO POINT TO THE FACT THAT AT SOME
5 PRISONS THERE HAVE BEEN IMPROVEMENTS. THEY NOTE, FOR EXAMPLE,
6 MULE CREEK. AND THE IMPLICATION FROM THEIR FINDINGS IS THAT --
7 THAT THEY WOULD LIKE YOU TO DRAW -- OR THE INFERENCE THAT THEY
8 WOULD LIKE YOU TO DRAW IS BECAUSE MULE CREEK WAS OVERCROWDED
9 AND THERE HAVE BEEN SOME IMPROVEMENTS, OVERCROWDING ISN'T THE
10 PRIMARY CAUSE. THE LOGIC THAT THEY SEEK TO USE FAILS BECAUSE
11 IT IS A FAULTY PREMISE.

12 NO WITNESS EXPRESSED AN OPINION THAT THE MEDICAL CARE
13 AT MULE CREEK IS CONSTITUTIONALLY ADEQUATE, BUT THE EVIDENCE
14 THAT THE DEFENDANTS PRESENTED TO THE COURT SHOWS THAT
15 MULE CREEK IS NOT PROVIDING ADEQUATE CARE.

16 FOR EXAMPLE, DEFENDANT'S EXHIBIT 1084, WHICH IS AN
17 INSPECTION CONDUCTED BY THE OFFICE OF THE INSPECTOR GENERAL,
18 FOUND POOR COMPLIANCE WITH MEDICATION POLICIES, INADEQUATE TB
19 PREVENTION POLICIES, INADEQUATE TREATMENT PLANS, INCLUDING
20 THOSE FOR PATIENTS WITH SERIOUS CHRONIC DISEASES.

21 DEFENDANT'S EXHIBIT 1227, WHICH IS THE RECEIVER'S
22 REPORT ON SPACE ISSUES AT MULE CREEK, STATES THAT PRISONERS ARE
23 NOT RECEIVING TIMELY CARE. THERE IS A BACKLOG OF REQUESTS FOR
24 MEDICAL ATTENTION, CLINIC FUNCTIONS THAT TAKE PLACE IN
25 INAPPROPRIATE AREAS, AND THERE ARE SEVERAL PROBLEMS WITH

1 MEDICATION DISTRIBUTION.

2 ALL THE OVERWHELMING WEIGHT OF THE EVIDENCE SUGGESTS,
3 PROVES THAT OVERCROWDING IS THE PRIMARY CAUSE OF THE CONTINUING
4 CONSTITUTIONAL MEDICAL CARE VIOLATIONS.

5 ASSUMING THAT CROWDING IS THE PRIMARY CAUSE,
6 DEFENDANTS ARGUE THAT A PRISONER RELEASE ORDER IS NOT NECESSARY
7 BECAUSE OTHER RELIEF WILL BE EFFECTIVE IN ACHIEVING THE
8 CONSTITUTIONAL COMPLIANCE.

9 THE BASIS OF THAT ARGUMENT IS THE RECEIVERSHIP,
10 WHICH, AS I HAVE ALREADY EXPLAINED, DEFENDANTS ARE SEEKING TO
11 ABOLISH.

12 IF THEIR MOTION BEFORE JUDGE HENDERSON IS
13 UNSUCCESSFUL, THE QUESTION THEN IS WHETHER THE RECEIVER'S
14 EFFORTS WILL BE SUFFICIENT.

15 BUT IF OVERCROWDING IS THE PRIMARY CAUSE, AS I THINK
16 YOU MUST FIND, THEN IT STANDS TO REASON THAT CROWDING MUST BE
17 ADDRESSED TO REMEDY THE CONSTITUTIONAL VIOLATION.

18 THE OVERWHELMING EVIDENCE AT TRIAL SUPPORTS THIS
19 CONCLUSION MOST NOTABLY FROM THE FORMER SECRETARY OF THE
20 DEPARTMENT OF CORRECTIONS AND REHABILITATION, NOT MISS WOODFORD
21 WHO TESTIFIED HERE, BUT MR. TILTON. SPEAKING IN PART ABOUT
22 HEALTHCARE, HE ADMITTED, QUOTE:

23 "THAT UNTIL I GET OVERCROWDING REDUCED, THEN I
24 DON'T HAVE THE OPPORTUNITY TO PROVIDE THE PROGRAM
25 THAT I BELIEVE IS MY CHARGE."

1 AGAIN, IF PROBLEMS WERE LIMITED TO A SHORTAGE OF
2 CLINICIANS TO TREAT THE PRISONERS, THERE MIGHT BE AN
3 ALTERNATIVE REMEDY, BUT THAT IS NOT THE PROBLEM. THE PROBLEM
4 IS THAT THE ENTIRE SYSTEM IS COLLAPSING BECAUSE OF
5 OVERCROWDING.

6 OVERCROWDING CAUSES LOCKDOWNS WHICH, IN TURN, INHIBIT
7 CARE AND CAUSE ILLNESS. CROWDING CREATES TEXTBOOK SCENARIOS
8 FOR THE SPREAD OF INFECTIOUS DISEASE. CROWDING ITSELF
9 INCREASES MENTAL ILLNESS AND SUICIDE, AS MR. BIEN WILL TALK
10 ABOUT, AND AS THE EXPERTS, CORRECTIONAL -- FORMER CORRECTIONAL
11 EXPERTS TESTIFIED AT LENGTH, CROWDING MAKES THE PRISON
12 IMPOSSIBLE TO MANAGE.

13 ALL OF THE PLAINTIFFS' CORRECTIONAL EXPERTS
14 TESTIFIED THAT CROWDING IS ESSENTIAL TO REMEDY THE
15 CONSTITUTIONAL VIOLATION, AND THERE WAS LITTLE EVIDENCE ON THE
16 OTHER SIDE OF THAT QUESTION.

17 WHEN ASKED WHAT THE COURT SHOULD DO IF CROWDING WAS
18 FOUND TO BE THE PRIMARY CAUSE, SHERIFF HENNESSY TESTIFIED THAT
19 THE POPULATION SHOULD BE REDUCED.

20 THE TESTIMONY OF OTHER CORRECTIONAL ADMINISTRATORS,
21 SUCH AS MR. TILTON AND MR. CATE, THAT CROWDING ITSELF SEVERELY
22 HAMPERS THE CDCR'S ABILITY TO MANAGE THE PRISON LEADS TO THE
23 REASONABLE INFERENCE THAT CROWDING MUST BE REDUCED IF THERE IS
24 TO BE ANY HOPE OF RESOLVING THESE CRITICAL ISSUES.

25 THE TESTIMONY OF DEFENDANTS' HEALTHCARE EXPERTS, DRs.

1 PACKER AND THOMAS, ALSO SUPPORTS PLAINTIFFS' CASE BECAUSE THEY
2 BOTH TESTIFIED THAT THE SYSTEMS THAT THEY WORKED IN HAVE
3 POPULATION CAPS.

4 THAT BRINGS US TO THE QUESTION OF RELIEF.

5 IF YOU FIND, AS I THINK YOU MUST, THAT NO OTHER
6 RELIEF WOULD BE PROVIDING EFFECTIVE REMEDY, YOU MUST --

7 **JUDGE REINHARDT:** COUNSEL, LET ME ASK YOU A QUESTION
8 ABOUT YOUR UNDERSTANDING OF THE TERM "RELIEF." YOU SAID "NO
9 OTHER RELIEF."

10 DO YOU UNDERSTAND THAT TO MEAN TO BE NO OTHER RELIEF
11 THAT MAY BE ORDERED BY THE COURT OR NO OTHER RELIEF IN A
12 BROADER SENSE; THAT THERE IS NOTHING ELSE THAT THE STATE COULD
13 DO TO ABOLISH IT?

14 **MR. SPECTER:** I THINK THE STATUTE MEANT NO OTHER
15 RELIEF THAT COULD BE ORDERED BY THE COURT. I THINK IF THERE
16 WERE CIRCUMSTANCES THAT WOULD AMELIORATE THESE OTHER CROWDING
17 CONDITIONS, YOU MIGHT CONSIDER THEM IN THE APPROPRIATE EXERCISE
18 OF YOUR EQUITABLE JURISDICTION, BUT I DON'T THINK -- I DON'T
19 THINK CONGRESS --

20 **JUDGE REINHARDT:** EXACTLY A LAWYER'S ANSWER.

21 **JUDGE KARLTON:** HE IS A LAWYER.

22 **JUDGE REINHARDT:** I CAN TELL.

23 **MR. SPECTER:** I'D GIVE YOU A MEDICAL ANSWER, BUT I'M
24 NOT QUALIFIED.

25 **JUDGE REINHARDT:** THE STATUTE SAYS THAT WE CAN ISSUE

1 AN ORDER ONLY IF THE COURT FINDS BY CLEAR AND CONVINCING
2 EVIDENCE THAT NO OTHER RELIEF WILL REMEDY THE VIOLATION OF THE
3 FEDERAL RIGHT.

4 NOW, FOR EXAMPLE, I SUPPOSE LEAVING ASIDE THE TIME
5 ELEMENT, YOU COULD SAY, WELL, IF WE BUILT 100 MORE PRISONS,
6 THAT COULD REMEDY THE VIOLATION.

7 **MR. SPECTER:** RIGHT.

8 **JUDGE REINHARDT:** LEAVING ASIDE THE TIME ELEMENT.

9 **MR. SPECTER:** THE TIME ELEMENT?

10 **JUDGE REINHARDT:** YES. THE FACT THAT IT MIGHT TAKE A
11 NUMBER OF YEARS AND THAT THAT MIGHT NOT BE AN ADEQUATE REMEDY.

12 LEAVING THAT ASIDE, LET'S ASSUME IF THE STATE CAME IN
13 AND SAID WE COULD BUILD A THOUSAND PRISONS TOMORROW, WE WILL
14 HAVE THEM ALL SET UP IN WAREHOUSES AND STRING THEM OUT, WOULD
15 THAT BE OTHER RELIEF THAT WOULD REMEDY THE VIOLATION OF THE
16 FEDERAL RIGHT UNDER THE STATUTE THAT SAYS WE CANNOT DO IT
17 UNLESS THERE IS NO OTHER RELIEF?

18 DOES THAT MEAN NO OTHER RELIEF WE CAN ORDER OR NO
19 OTHER RELIEF THAT COULD EXIST IN THE WORLD?

20 **MR. SPECTER:** WELL, LET ME GIVE YOU A LEGAL ANSWER TO
21 THAT QUESTION.

22 THE STATUTE THAT GUIDES PROSPECTIVE RELIEF IN ANOTHER
23 SECTION, AND IN THAT PROSPECTIVE RELIEF -- I CAN'T REMEMBER THE
24 EXACT LANGUAGE, BUT IT TALKS ABOUT THE TYPE OF INJUNCTIONS,
25 CONSENT DECREES, THOSE TYPE OF THINGS. SO ONE COULD --

1 **JUDGE REINHARDT:** THE SECTION WE WERE READING TALKS
2 ABOUT TERMINATION OF PROSPECTIVE RELIEF.

3 YOU CAN SAY YOU DON'T HAVE A POSITION ON THAT
4 QUESTION IF YOU LIKE.

5 **MR. SPECTER:** WELL, OKAY. I THINK WHAT CONGRESS
6 MEANT WHEN THEY USED THE TERM "RELIEF" IS THAT THEY MEANT COURT
7 ORDERED RELIEF. IF IN YOUR HYPOTHETICAL QUESTION THERE WERE A
8 THOUSAND PRISONS AVAILABLE TO REDUCE CROWDING TOMORROW --

9 **JUDGE KARLTON:** WE COULD ORDER THAT.

10 **MR. SPECTER:** YEAH. I DON'T BELIEVE THAT -- I MEAN,
11 I COULD UNDERSTAND THE COURT THINKING, WELL, MAYBE WE SHOULDN'T
12 ORDER -- ISSUE INJUNCTIVE RELIEF AT THIS POINT BECAUSE THE
13 SITUATION IS GOING TO BE RESOLVED TOMORROW. THAT ISN'T THE
14 CASE TODAY, SO I DON'T REALLY THINK YOU HAVE TO REACH THAT
15 QUESTION.

16 **JUDGE REINHARDT:** I WAS JUST TRYING TO GIVE YOU SOME
17 EXAMPLES. YOU DON'T HAVE TO DEAL WITH THE EXAMPLES. I'M
18 ASKING FOR YOUR CONSTRUCTION IN PARAGRAPH E, WHICH SAYS -- IT
19 REACHES THE HEART OF --

20 **MR. SPECTER:** HERE IT IS, JUDGE. I'VE GOT IT. I'M
21 SORRY TO INTERRUPT YOU.

22 G-9 SAYS:

23 "THE TERM 'RELIEF' MEANS ALL RELIEF IN ANY FORM
24 THAT MAY BE GRANTED OR APPROVED BY THE COURT."

25 **JUDGE REINHARDT:** SO GRANTED OR APPROVED. IN OTHER

1 WORDS, RELIEF THAT'S BEYOND OUR JURISDICTION TO GRANT.

2 MR. SPECTER: RIGHT.

3 JUDGE REINHARDT: IS NOT --

4 JUDGE KARLTON: IS NOT CONTEMPLATED BY THE STATE.

5 JUDGE REINHARDT: RIGHT. IS NOT INCLUDED IN THE
6 STATUTE WHEN IT SAYS WE CAN'T ORDER A RELEASE ORDER UNLESS WE
7 FIND THAT NO OTHER RELIEF WILL REMEDY THE VIOLATION. THAT
8 MEANS NO OTHER RELIEF WE CAN GRANT.

9 MR. SPECTER: YES.

10 JUDGE REINHARDT: OKAY.

11 JUDGE KARLTON: CAN I TURN YOUR ATTENTION TO WHERE I
12 THINK YOU ARE GOING ANYHOW, WHICH IS WHAT FORM OF RELIEF?

13 ALTHOUGH THE PROPOSED FINDINGS OF FACT SUBMITTED BY
14 THE PLAINTIFF IS A REMARKABLE DOCUMENT, AND I WANT YOU TO KNOW
15 I REALLY BELIEVE THAT --

16 MR. SPECTER: THANK YOU.

17 JUDGE KARLTON: -- ONE ASPECT OF IT IS THE REPEATED
18 ASSERTION THAT THE INTERVENOR'S RESPONSES ARE EXAGGERATED.

19 EVEN IF THEY WERE SOMEWHAT EXAGGERATED, AND I'M NOT
20 EVEN SURE THAT'S TRUE, BUT EVEN IF THEY WERE SOMEWHAT
21 EXAGGERATED, THERE IS NO QUESTION THAT THIS WILL HAVE -- IF WE
22 WERE TO ISSUE A PRISONER RELEASE ORDER, IT WOULD HAVE A
23 PROFOUND EFFECT UPON THE LOCAL COMMUNITIES.

24 IS THAT AN APPROPRIATE CONCERN OF THE COURT? THAT'S
25 NUMBER ONE. THAT IS, IS IT SOMETHING WE CAN CONSIDER OR IS IT

1 -- OUR RESPONSE IS, LOOK, THERE IS A CONSTITUTIONAL VIOLATION.
2 WE'VE GOT TO DO WHAT WE'VE GOT TO DO. IT'S UP TO THE STATE AND
3 COUNTIES TO WORK OUT HOW THAT GETS DONE SO AS TO MINIMIZE THE
4 CONSEQUENCES.

5 THAT'S NUMBER ONE.

6 AND NUMBER TWO, IS IT APPROPRIATE FOR THE COURT IF WE
7 REACH THIS POINT TO ORDER THE STATE TO AT LEAST SHARE SOME OF
8 THE SAVINGS THAT IT WILL ACHIEVE? IS THAT AN APPROPRIATE THING
9 FOR THIS COURT TO DO?

10 THOSE ARE TWO SEPARATE QUESTIONS.

11 **MR. SPECTER:** YES, YOUR HONOR. AND I HAVE PREPARED
12 AN ANSWER AS TO THE SECOND ONE, WHICH I HOPE WILL BE
13 PERSUASIVE.

14 ON THE FIRST POINT, I THINK YOU ABSOLUTELY MUST
15 CONSIDER UNDER THE STATUTE ANY POTENTIAL ADVERSE IMPACT ON
16 PUBLIC SAFETY.

17 **JUDGE KARLTON:** NO, NOT POTENTIAL. NOT POTENTIAL.
18 BUT ADVERSE EFFECT UPON PUBLIC SAFETY.

19 **MR. SPECTER:** YOU ARE RIGHT. YOU'RE RIGHT.

20 **JUDGE KARLTON:** THIS IS VERY IMPORTANT.

21 **MR. SPECTER:** YES.

22 **JUDGE KARLTON:** GIVEN THE APPARENTLY UNDISPUTED
23 AGREEMENT PLAINTIFFS, DEFENDANTS, EVERYBODY, THAT THE PRESENT
24 PRISON SYSTEM IS CRIMINOGENIC, IT SEEMS TO ME THAT ARGUMENTS
25 ABOUT PUBLIC SAFETY ARE PROBABLY NOT ALL THAT PERSUASIVE.

1 THAT DOESN'T DENY THE REALITY THAT IF WE RELEASE
2 PEOPLE, IT WILL HAVE A VERY PROFOUND EFFECT, VERY PROFOUND, A
3 VERY PROFOUND EFFECT UPON THE COUNTIES' ABILITY TO FUNCTION.

4 **MR. SPECTER:** RIGHT.

5 **JUDGE KARLTON:** CAN WE CONSIDER THAT? OUGHT WE TO
6 CONSIDER THAT?

7 **MR. SPECTER:** FIRST I WOULD LIKE TO TAKE SOME ISSUE
8 WITH YOUR PREMISE, SINCE THIS IS ARGUMENT.

9 **JUDGE KARLTON:** ALL RIGHT.

10 **MR. SPECTER:** AND THEN I WOULD LIKE TO ANSWER YOUR
11 QUESTION AFTER THAT.

12 **JUDGE KARLTON:** ALL RIGHT.

13 **MR. SPECTER:** ALL OF THE INFORMATION THAT WE
14 PRESENTED TO YOU, AND SOME OF THE INFORMATION THAT THE STATE
15 PRESENTED TO YOU, SUGGESTS THAT A PRISONER RELEASE ORDER WILL
16 NOT HAVE THE KIND OF PROFOUND IMPACT THAT THE INTERVENORS AND
17 IN SOME RESPECTS THE STATE ARE ARGUING.

18 THIS HAS BEEN DONE ACROSS THE COUNTRY, IN CANADA,
19 IT'S BEEN DONE IN MANY COUNTIES THROUGHOUT CALIFORNIA. AND IN
20 NONE OF THOSE COUNTIES, NONE OF THOSE STATES, AND IN CANADA AND
21 IN CITIES HAS THE CRIME RATE INCREASED AS A RESULT OF THAT.

22 AND I THINK DR. AUSTIN SHOWED YOU THAT THE IMPACT OF
23 THE ARRESTS OF PAROLEES -- IN OTHER WORDS, THE ADDITIONAL
24 PEOPLE WHO ARE GOING TO COME OUT -- IS NOT GOING TO BE
25 PROFOUND. IT'S GOING TO BE RELATIVELY, IN MY VIEW,

1 INSIGNIFICANT IN TERMS OF NUMBERS. REMEMBER --

2 **JUDGE REINHARDT:** EVEN IF THAT'S NOT SHOWN, IT'S
3 CLEAR THAT SOME OF THE PEOPLE WOULD BE RELEASED WITHOUT
4 RECEIVING SOME OF THE TREATMENT THAT IS DESIRABLE TO MAKE IT
5 POSSIBLE FOR THEIR REENTRY INTO SOCIETY.

6 **MR. SPECTER:** YES, YOUR HONOR.

7 **JUDGE REINHARDT:** WHICH THE COUNTIES SHOULD -- A
8 BURDEN THE COUNTIES SHOULD UNDERTAKE, AND WHETHER IT -- EVEN
9 MORE THAN WHETHER IT AFFECTS THE CRIME RATE, IT'S WHETHER THAT
10 PEOPLE WHO ARE BEING RELEASED SHOULD BE TRAINED FOR EMPLOYMENT,
11 SHOULD RECEIVE DRUG TREATMENT, SHOULD RECEIVE OTHER TREATMENT
12 THAT ALLOWS THEM BETTER TO INTEGRATE INTO SOCIETY.

13 AND I THINK JUDGE KARLTON'S QUESTION, HOWEVER YOU
14 VIEW IT, IS WHEN WE KNOW THAT IF THE RELEASE ORDER, WHICH IS A
15 VERY BROAD TERM, WOULD RESULT IN SUBSTANTIAL SAVINGS TO THE
16 STATE, ALL RIGHT, THE QUESTION IS, DOES THE COURT HAVE THE
17 AUTHORITY TO DIVERT SOME OF THOSE SAVINGS OUT OF THE PRISON
18 BUDGET TO -- THE STATE IS NOW HELPING THE COUNTIES IN A SENSE.

19 DO WE HAVE THE AUTHORITY TO DIRECT THE STATE TO
20 DIVERT SOME OF THOSE SAVINGS TO THE COUNTIES?

21 **JUDGE KARLTON:** AND TO FOLLOW UP PRECISELY WHAT
22 JUDGE REINHARDT IS ASKING YOU TO EXPLORE, IS IT AN APPROPRIATE
23 CONSIDERATION OF OURS -- AN ARGUMENT CAN BE MADE, IT SEEMS TO
24 ME -- I'M NOT SAYING IT SHOULD BE MADE, BUT CAN BE MADE. LOOK,
25 THAT'S A PROBLEM OF THE STATE AND THE COUNTIES AND THEY ARE

1 GOING TO HAVE TO WORK IT OUT.

2 OUR OBLIGATION IS TO ENSURE ADEQUATE MEDICAL CARE AND
3 ADEQUATE MENTAL HEALTH CARE. THAT CAN BE ACCOMPLISHED ONLY BY
4 RELEASING THE PRISONERS AND WHATEVER HAPPENS AFTER THAT, AS
5 LONG AS IT DOESN'T SIGNIFICANTLY AFFECT PUBLIC SAFETY, THAT'S A
6 PROBLEM OF THE STATE. THAT'S AN ARGUMENT THAT CAN BE MADE.

7 IS IT AN APPROPRIATE ARGUMENT? AND IF IT IS NOT AN
8 APPROPRIATE ARGUMENT, THEN WE COME BACK TO JUDGE REINHARDT'S
9 VERY SERIOUS QUESTION, WHICH IS: ARE WE CAPABLE OF AND SHOULD
10 WE ORDER THE STATE TO SHARE THE SAVINGS?

11 **MR. SPECTER:** I WILL ANSWER YOUR QUESTION DIRECTLY.
12 AFTER I ANSWER IT, I WOULD LIKE TO COME BACK TO THE PREMISE OF
13 THE QUESTION AGAIN.

14 THE ANSWER TO THE QUESTION IS NO, I DON'T BELIEVE YOU
15 SHOULD ORDER FUNDING TO THE COUNTIES. AND LET ME EXPLAIN --

16 AND THE ANSWER TO YOUR QUESTION IS, I THINK THE
17 ARGUMENT THAT YOU MADE IS THE RIGHT ONE AND --

18 **JUDGE KARLTON:** I'M NOT SAYING --

19 **MR. SPECTER:** BUT I AM. I AM --

20 **JUDGE REINHARDT:** MY QUESTION IS: DO WE HAVE THE
21 AUTHORITY TO?

22 **MR. SPECTER:** NO. I DON'T THINK -- I DON'T THINK YOU
23 HAVE THE AUTHORITY TO. I DON'T WANT YOU TO. WE ARE NOT ASKING
24 FOR IT. AND LET ME --

25 **JUDGE KARLTON:** WE ARE NOT BOUND BY WHAT YOU ARE

1 ASKING. ONE OF THE PROBLEMS --

2 **JUDGE REINHARDT:** NOR DO WE PARTICULARLY CARE WHAT
3 YOU ARE ASKING.

4 THE QUESTION IS: IS THAT THE RIGHT AND PROPER THING
5 TO DO IF YOU GET THE KIND OF ORDER YOU WANT? SHOULDN'T THE
6 COUNTIES HAVE SOME ADDITIONAL FUNDING TO TRY TO DEAL WITH THE
7 PROBLEM YOU HAVE CREATED?

8 AND I'M NOT SURE WHY YOU DON'T WANT THE COUNTIES TO
9 HAVE THE BENEFIT OF THE SAVINGS.

10 **JUDGE KARLTON:** HE IS SAYING WE DON'T HAVE THE
11 REPORT.

12 **JUDGE REINHARDT:** HE SAID, "I DON'T WANT YOU TO."

13 **MR. SPECTER:** NO, I DON'T WANT YOU TO ORDER IT
14 BECAUSE I'M NOT SURE YOU HAVE -- I DON'T THINK YOU HAVE THE
15 AUTHORITY TO DO IT.

16 DO I WANT IT PERSONALLY? YES. I THINK EVERYBODY IN
17 THIS ROOM PROBABLY WANTS IT.

18 **JUDGE REINHARDT:** I'M NOT SURE THAT YOU REPRESENT THE
19 STATE.

20 **MR. SPECTER:** WELL, I'M NOT SAYING WHAT THEY ARE --
21 REGARDLESS OF THAT, I PERSONALLY THINK IT WOULD BE A RATIONAL
22 THING FOR THE STATE TO DO IF THE STATE IS CONCERNED ABOUT
23 PUBLIC SAFETY.

24 BUT, REMEMBER, THIS CASE IS BEING APPEALED DIRECTLY
25 TO THE SUPREME COURT AND THE SUPREME COURT HAS SAID ON MANY

1 OCCASIONS THAT THE COURT MUST INTRUDE AS LITTLE AS POSSIBLE
2 ONTO STATE CONCERNS, ESPECIALLY ONES SUCH AS CRIMINAL JUSTICE
3 POLICY.

4 AND THE MOST NARROW REMEDY IS FOR YOU TO ORDER THEM
5 TO REDUCE THE POPULATION TO AN ACCEPTABLE LEVEL, AND THEN HOW
6 IT DOES THAT AND WHAT LEVEL OF PUBLIC SAFETY THE STATE WANTS TO
7 SUPPORT THROUGH FUNDING IS A MATTER UP TO THE STATE.

8 **JUDGE REINHARDT:** WELL, WE ARE SUPPOSED TO CONSIDER
9 THE EFFECTS ON THE PUBLIC SAFETY. AND SO IT'S NOT ENOUGH TO
10 SAY RELEASE, HAVE A CAP WHICH WOULD RESULT IN THE RELEASE OF
11 PRISONERS.

12 IF THE STATE SAID, WELL, WE'RE GOING TO RELEASE THE
13 40,000 MOST DANGEROUS PRISONERS, THAT WOULD HAVE A FAR GREATER
14 EFFECT ON PUBLIC SAFETY THAN IF THEY DID IT THROUGH SOME PAROLE
15 REFORM EXPERIENCES.

16 I DON'T SEE HOW WE CAN ANSWER THE QUESTION OF THE
17 EFFECT ON PUBLIC SAFETY WITHOUT KNOWING HOW THE STATE WOULD
18 IMPLEMENT THIS ORDER.

19 **JUDGE KARLTON:** I DON'T WANT TO KEEP INTERRUPTING
20 YOU, BUT THIS IS REALLY THE -- IN MY VIEW, A CRUX QUESTION.

21 I DON'T THINK THAT THERE IS ANY DOUBT THAT WE CAN SAY
22 SOMETHING TO THE STATE IN CONSIDERING A RELEASE ORDER, IF
23 THAT'S WHAT WE ORDER; THAT YOU CONSIDER RELEASING THOSE PERSONS
24 WHO ARE THE LEAST LIKELY TO REPRESENT A DANGER TO THE PUBLIC.

25 I THINK WE CAN SAY YOU'VE GOT TO RELEASE DRUG ADDICTS

1 RATHER THAN MURDERERS. I THINK WE CAN SAY THAT.

2 **MR. SPECTER:** YOU CAN SAY, LIKE JUDGE REINHARDT
3 IMPLIED, WHATEVER YOU THINK IS APPROPRIATE.

4 MY ADVICE IS THAT YOU ORDER THE STATE TO COME UP WITH
5 A PLAN. THE STATE WILL COME UP WITH A PLAN IN CONSULTATION
6 WITH THE PARTIES.

7 IF ANY PARTY BELIEVES THAT THERE ARE OBJECTIONS TO
8 THAT PLAN -- IN OTHER WORDS, THE COUNTY INTERVENORS BELIEVE
9 THAT IT COULD BE DONE IN A SAFER, MORE APPROPRIATE WAY -- THAT
10 WOULD BE THE APPROPRIATE TIME TO RAISE THAT OBJECTION. IT
11 WOULD ALSO BE THE APPROPRIATE TIME FOR THE COURT TO CONSIDER
12 THE OTHER ISSUES.

13 THE STATE TAKES AS ONE OF ITS FIRST RESPONSIBILITIES,
14 IT SAYS, PUBLIC SAFETY. SO WOULDN'T THE APPROPRIATE WAY TO
15 HANDLE THIS BE TO GIVE THE STATE THE OPPORTUNITY TO PROVIDE A
16 PLAN THAT IT BELIEVES WILL BE CONSISTENT WITH ITS VIEW OF
17 PUBLIC SAFETY?

18 **JUDGE REINHARDT:** WELL, I'M NOT SURE. WE MAY BE
19 GETTING A LITTLE BIT AHEAD, BUT NOT NECESSARILY. BECAUSE IN
20 ORDER TO DECIDE, ONE SHOULD LOOK TO THE FUTURE AND SEE WHAT IT
21 MEANS. AND IF WE ARE CONSIDERING THE PUBLIC SAFETY AS AN
22 ISSUE, WE HAVE TO KNOW WHAT THE STATE WOULD DO.

23 WE CAN'T SAY STEP ONE, FOR EXAMPLE, YES, THIS COULD
24 BE DONE IN A MANNER THAT WOULD PROTECT THE PUBLIC SAFETY OR
25 WOULD NOT HAVE CONSIDERATION OF THAT.

1 AND THIS IS ALL AN ABSTRACT THEORETICAL DISCUSSION,
2 BUT SUPPOSE WE WERE TO CONCLUDE, YES, WE HAVE HEARD A LOT OF
3 TESTIMONY AND THIS COULD BE DONE IN A WAY THAT DOES NOT AFFECT
4 THE PUBLIC SAFETY. AND THEN WE SAY TO THE STATE, WELL, TELL US
5 HOW YOU WANT TO DEAL WITH IT.

6 **MR. SPECTER:** RIGHT.

7 **JUDGE REINHARDT:** AND THE STATE SAYS, WELL, WE WANT
8 TO RELEASE ALL THE AXE MURDERERS WE CAN FIND, WHICH MAY SOUND
9 IRRATIONAL. BUT AT TIMES THE STATE HAS NOT BEEN ENTIRELY
10 RATIONAL.

11 **JUDGE KARLTON:** INDEED, IF YOU READ MY
12 CORRESPONDENCE, I GET A LETTER A WEEK FROM SOMEBODY WHO IS
13 DOING A LIFE TERM FOR MURDER WHO SAYS, WE ARE THE LEAST LIKELY
14 PEOPLE IN THE WORLD TO RECIDIVATE.

15 **MR. SPECTER:** AND IT'S NOT IN EVIDENCE, BUT THAT'S,
16 IN FACT, TRUE.

17 **JUDGE REINHARDT:** ANYWAY, TO GET BACK -- SO YOUR
18 POINT IS WE COULD SAY THAT IT COULD BE DONE.

19 **MR. SPECTER:** YES.

20 **JUDGE REINHARDT:** BUT WE HAVE A RESPONSIBILITY FOR
21 PUBLIC SAFETY, WHATEVER WE ORDER. AND IF WE ORDER A CAP AND
22 THEN THE STATE DECIDES WE ARE GOING TO DO THIS IN A WAY THAT'S
23 DANGEROUS TO THE PUBLIC SAFETY, YOU SAY THAT THAT COMES UP AT
24 THE FINAL STAGE OF THE PROCEEDING AFTER WE HAVE ORDERED A CAP
25 AND ORDERED THE STATE TO REPORT BACK WITH A PLAN.

1 AND THEN THE OTHER PARTIES WOULD OBJECT, THAT IT
2 DOESN'T PROTECT THE PUBLIC SAFETY SUFFICIENTLY. AND THEN WHAT?
3 THEN DO WE HAVE THE AUTHORITY TO TELL THE STATE HOW TO DO IT?

4 **MR. SPECTER:** I DIDN'T BRIEF THAT QUESTION. I
5 DON'T -- I DON'T KNOW AT THAT POINT.

6 YOU KNOW, I THINK AT THIS POINT THAT THE COURSE OF
7 ACTION THAT WE HAVE SUGGESTED IS THE RIGHT ONE.

8 IF, IN FACT, THE STATE DOESN'T COME UP WITH AN
9 ADEQUATE PLAN AND YOU FIND THAT THEY'VE BEEN GIVEN THE
10 OPPORTUNITY TO COME UP WITH AN ADEQUATE PLAN, AND THERE ARE
11 WAYS IN WHICH IT CAN BE DONE SAFELY AND THE STATE CHOOSES NOT
12 TO DO THAT, THEN I MAY VERY WELL REVISE MY ANSWER ABOUT YOUR
13 AUTHORITY.

14 **JUDGE KARLTON:** JUDGE JACK WEINSTEIN OF THE EASTERN
15 DISTRICT OF NEW YORK AND I'VE HAD THIS ONGOING CONVERSATION.
16 HIS VIEW OF CASES LIKE THIS IS IF THE COURT ORDERS THE REMEDY,
17 IT DOESN'T DO ANYTHING ELSE; AND IF SOMEBODY THINKS THAT THOSE
18 WHO HAVE BEEN ORDERED TO REMEDY FAIL, THEY CAN BRING AN ORDER
19 IN CONTEMPT.

20 YOU KNOW, I HAVE SAID NO, THAT'S NOT THE RIGHT WAY.
21 WELL, OBVIOUSLY, I'VE GOT A SPECIAL MASTER AND BEEN WORKING AT
22 IT FOR A LOT OF YEARS.

23 **JUDGE REINHARDT:** BUT YOUR ANSWER IS YOU WOULD LIKE
24 TO CONSIDER REVISING YOUR ANSWER WHEN WE GET TO THE --

25 **MR. SPECTER:** WHEN WE SEE WHAT THE DEFENDANT IS GOING

1 TO DO.

2 **JUDGE REINHARDT:** SHOULD WE EVER REACH THAT POINT.

3 **MR. SPECTER:** YES, YOUR HONOR.

4 **JUDGE REINHARDT:** ALL RIGHT.

5 **MR. SPECTER:** AND I WANT TO MAKE A COUPLE OF POINTS
6 ABOUT THIS. IT'S IMPORTANT TO REMEMBER THAT THE STATE IS
7 TRYING TO HAVE IT BOTH WAYS IN THEIR ARGUMENT.

8 THEY ARE SAYING THAT IT WOULD BE DANGEROUS TO LET OUT
9 PRISONERS. THEY ARE ALSO SAYING THAT THERE ARE THESE METHODS
10 BY WHICH PUBLIC SAFETY CAN BE IMPROVED. AND THEY ARE ALSO
11 SAYING THAT THE COURT SHOULDN'T ORDER THEM TO PROVIDE FUNDING
12 TO THE LOCAL COMMUNITIES TO MINIMIZE THE EFFECT ON PUBLIC
13 SAFETY.

14 IT SEEMS TO ME THAT IF THIS IS A DECISION THAT'S
15 GOING TO BE LEFT UP TO THE STATE, IN OTHER WORDS, TO DETERMINE
16 HOW MUCH FUNDING THEY'RE GOING TO BE PROVIDING FOR PUBLIC
17 FUNDING TO THE LOCAL COMMUNITIES, THEN IT SHOULD NOT BE A
18 FACTOR IN DECIDING WHETHER OR NOT POPULATION WITH THESE ORDERS
19 SHOULD ISSUE.

20 ON THE OTHER HAND, I STRONGLY URGE THE COURT -- ONE
21 OF THE CASES THAT THE DEFENDANTS CITED, ANDERSON VERSUS
22 REDMOND, IS A CASE OUT OF DELAWARE, I BELIEVE, IN WHICH THE
23 DISTRICT COURT WAS FACED WITH A SIMILAR SITUATION ON A MUCH
24 SMALLER SCALE.

25 AND IT FOLLOWED THE COURSE OF ACTION THAT WE ARE

1 SUGGESTING, WHICH IS THAT THE COURT ORDER THE STATE TO REDUCE
2 ITS PRISON POPULATION. AND THEN IT WENT ON TO FIND THAT THERE
3 WERE VARIOUS METHODS BY WHICH THE STATE COULD DO THIS IN A SAFE
4 AND COST-EFFECTIVE MANNER.

5 AND AT THIS STAGE OF THE PROCEEDINGS, THAT'S WHAT I
6 THINK THE APPROPRIATE COURSE OF ACTION WOULD BE FOR THE COURT.

7 **JUDGE HENDERSON:** SHOULD WE HAVE TO HAVE AN
8 EVIDENTIARY HEARING NOW IF WE MAKE THAT FINDING, THAT THEY
9 COULD IT IN A CERTAIN WAY. WHAT EXPERTISE WOULD WE BRING TO
10 BEAR TO DO THAT?

11 **MR. SPECTER:** WELL, I'M TALKING ABOUT NOW. WE
12 PRESENTED YOU WITH EVIDENCE --

13 **JUDGE KARLTON:** NO, NO. ASSUME -- YOU'RE MISSING
14 JUDGE HENDERSON'S POINT.

15 **MR. SPECTER:** OKAY.

16 **JUDGE KARLTON:** ASSUMING THAT THE STATE PRESENTS A
17 PLAN. PLAINTIFFS SAY OR THE COUNTIES SAY OR SOMEBODY SAY, IT'S
18 INADEQUATE FOR REASON A, B OR C. WHAT DO WE DO THEN?

19 **MR. SPECTER:** THEN I THINK, YOU KNOW, YOU MAY HAVE TO
20 HAVE AN EVIDENTIARY HEARING IF IT CAN'T BE RESOLVED OTHERWISE.
21 WE DON'T KNOW WHAT POLICY CHOICES THE STATE IS GOING TO MAKE.
22 WE DON'T KNOW WHAT THE FACTS ARE GOING TO BE. WE DON'T KNOW
23 WHAT THE COUNTIES' ARGUMENTS ARE GOING TO BE.

24 BUT I DO THINK THAT --

25 **JUDGE REINHARDT:** YOU SUGGEST FOR NOW WE ASSUME THAT

1 IT WOULD -- IF WE ARE SAYING THAT CERTAIN STEPS CAN BE TAKEN,
2 THEY ARE NOT NECESSARILY INVOLVED IN OPENING THE GATES.

3 **MR. SPECTER:** YES, YOUR HONOR.

4 **JUDGE REINHARDT:** BUT CONSTITUTE A PRISONER RELEASE
5 ORDER, IN THE BROAD SENSE OF THE WORD, WHICH MAY JUST MEAN
6 CHANGING RULES GOVERNING PAROLE OR PROGRAMS IN PRISON.

7 **MR. SPECTER:** RIGHT.

8 **JUDGE REINHARDT:** IF WE DO THAT NOW, WE SHOULD JUST
9 WAIT AND SEE. WE SHOULD ASSUME THAT THE STATE COULD COME UP
10 WITH A REASONABLE WAY TO IMPLEMENT THAT, AND THAT WE SHOULD
11 THEN HAVE THE REPORT BACK OR HOPE THAT SHOULD WE ORDER THAT,
12 THAT EVERYONE WILL LOOK AT IT AND SAY WHAT A WONDERFUL SOLUTION
13 THIS AT THE SAME TIME.

14 **MR. SPECTER:** WELL, HOWEVER UNLIKELY THAT APPEARS TO
15 ME --

16 **JUDGE REINHARDT:** WELL, IT MAY NOT BE. THE STATE'S
17 OWN REPORTS LAY OUT WHAT COULD BE DONE.

18 **MR. SPECTER:** RIGHT. AND NOT ONLY THAT, BUT IF IT'S
19 DONE IN CONSULTATION WITH OTHER PARTIES, THERE MAY NOT BE AS
20 MUCH DISAGREEMENT ON THAT AS THERE HAS BEEN ON THESE ISSUES
21 HERE TODAY.

22 SO I THINK THE SUPREME COURT MAKES IT PRETTY CLEAR
23 THAT YOU HAVE TO GIVE THE STATE THE FIRST OPPORTUNITY TO DO
24 THESE THINGS. AND ONCE YOU HAVE GIVEN THEM THAT OPPORTUNITY,
25 THEN YOUR ROLE SORT OF SWITCHES IF IT'S NOT ADEQUATE.

1 **JUDGE HENDERSON:** AND DO WE ORDER THE STATE TO
2 CONSULT WITH THE PLAINTIFFS OR DO WE ASSUME THAT THEY WILL DO
3 IT?

4 **MR. SPECTER:** I THINK YOU BETTER ORDER THEM TO DO IT.
5 IT WOULD SOLVE A LOT OF PROBLEMS.

6 AND WHAT WE HAVE ALSO SUGGESTED IN OUR MOTION, IF THE
7 STATE BELIEVES IT A GOOD IDEA AFTER YOUR ORDER ISSUES, IS THAT
8 ON REQUEST OF THE STATE YOU APPOINT AN INDEPENDENT EXPERT UNDER
9 RULE 706 OR 703 --

10 **JUDGE KARLTON:** THERE IS SOMETHING TO BE SAID THAT
11 THERE ARE ENOUGH EXPERTS TRYING TO GET THE STATE -- NEVER MIND.
12 GO AHEAD. NEVER MIND. WHETHER ANOTHER EXPERT WOULD MAKE ANY
13 DIFFERENCE AT SOME POINT, NOT CLEAR AT ALL.

14 **MR. SPECTER:** CAN I THAT ADDRESS THAT THOUGH?

15 THERE IS NO QUESTION THAT THERE IS ENOUGH REPORTS OUT
16 THERE WITH IDEAS IN IT THAT WE DON'T NEED ANOTHER ONE OF THOSE.

17 WHAT WOULD BE HELPFUL, IN MY VIEW, AND I HOPE THE
18 STATE WOULD AGREE, IS SOMEBODY TO HELP CRUNCH THE NUMBERS,
19 HELP -- SOMEBODY WHO IS EXPERIENCED IN WORKING OUT THESE KIND
20 OF DETAILS WHO WOULD PROVIDE --

21 **JUDGE REINHARDT:** IF YOU BOTH AGREE THAT WOULD BE
22 HELPFUL, IT WOULD BE NO PROBLEM.

23 **JUDGE KARLTON:** SURE.

24 **MR. SPECTER:** THAT WOULD BE GOOD.

25 I'M ALMOST OUT OF THE TIME. I WAS GOING TO TAKE -- I

1 DIDN'T FINISH --

2 **JUDGE HENDERSON:** DON'T FEEL COMPELLED TO STOP AT
3 YOUR ESTIMATE.

4 **MR. SPECTER:** SO THEN I WILL GO A LITTLE BIT.

5 OKAY. LET ME TELL YOU A LITTLE BIT ABOUT WHY I
6 BELIEVE THAT THE EVIDENCE SHOWS THAT A PRISONER RELEASE ORDER
7 WOULD NOT HAVE AN ADVERSE EFFECT ON PUBLIC SAFETY.

8 AND I THINK YOU CAN DRAW THAT FACTUAL FINDING FROM
9 BASICALLY THE UNDISPUTED EVIDENCE IN THE CASE. AND THAT IS, AS
10 I MENTIONED BEFORE --

11 **JUDGE REINHARDT:** WHEN YOU SAY "A PRISONER RELEASE
12 ORDER WOULD NOT HAVE AN ADVERSE EFFECT," WHAT TYPE OF PRISONER
13 RELEASE ORDER ARE YOU REFERRING TO? A "PRISONER RELEASE ORDER"
14 IS A VAST AND BROAD TERM.

15 **MR. SPECTER:** I'M REFERRING TO A PRISONER RELEASE
16 ORDER WHICH INCORPORATES MANY, IF NOT ALL, OF THE PROPOSALS
17 THAT THE STATE, THROUGH THE GOVERNOR, HAS ALREADY MADE TO
18 REDUCE THE PRISON POPULATION, SUCH AT DIVERSION, ENHANCED
19 CREDIT EARNING PROCESSES, PAROLE REFORM, PROGRAMS IN BOTH THE
20 COMMUNITY AND IN THE PRISON WHICH HAVE THE EFFECT OF WHAT WE
21 CALL EVIDENCE-BASED PROGRAMS WHICH HAVE BEEN EFFECTIVE REDUCING
22 CRIME.

23 ALL OF THOSE MECHANISMS WHICH THE GOVERNOR HAS
24 PROPOSED, WHICH THE EXPERT PANEL HAS ENDORSED, WHICH OUR
25 EXPERTS HAVE ALSO ENDORSED. I THINK THAT THE EVIDENCE IS

1 OVERWHELMING THAT ALL THE OF THOSE METHODS WOULD BE ABLE TO
2 REDUCE THE POPULATION SIGNIFICANTLY WITHOUT AFFECTING PUBLIC
3 SAFETY.

4 **JUDGE REINHARDT:** THE PROBLEM IN DISCUSSING THIS
5 ISSUE, EVEN BETWEEN THE PARTIES, IS THAT WE SOMETIMES LOSE
6 TRACK OF THE FACT THAT A PRISONER RELEASE ORDER IS NOT AN ORDER
7 TO RELEASE PRISONERS.

8 **JUDGE KARLTON:** IT MAY BE, IN ADDITION TO EVERYTHING
9 ELSE.

10 **JUDGE REINHARDT:** IT COULD BE, BUT IT'S NOT. WHEN WE
11 SAY A "PRISONER RELEASE ORDER," WE ARE NOT TALKING ABOUT
12 NECESSARILY ABOUT AN ORDER TO RELEASE PRISONERS.

13 FOR INSTANCE, IN THE STATE'S RESPONSE TO OUR QUESTION
14 ABOUT THE GOVERNOR'S BUDGET AND WHAT THE GOVERNOR THOUGHT WAS
15 PROPER FOR THE STATE, THEY SAY, WELL, HE DIDN'T SAY RELEASE
16 PRISONERS. BUT WHAT HE DID SAY WERE THINGS THAT CONTEMPLATE --
17 THAT CONSTITUTE A PRISONER RELEASE ORDER.

18 **JUDGE KARLTON:** WITHIN THE MEANING OF THE PLRA.

19 **MR. SPECTER:** YOU'RE EXACTLY RIGHT, YOUR HONOR.
20 THAT'S AN UNFORTUNATE PHRASE THAT THEY USE TO DEFINE --

21 **JUDGE REINHARDT:** PEOPLE READING A DECISION ORDERING
22 A PRISONER RELEASE ORDER ASSUME THAT THE ORDER SAYS, OPEN THE
23 DOORS, RELEASE PRISONERS. THAT'S NOT, I ASSUME, WHAT YOU'RE
24 TALKING ABOUT WHEN YOU SAY THAT IT WOULD NOT PROVIDE A RISK TO
25 THE PUBLIC SAFETY.

1 **MR. SPECTER:** THAT'S EXACTLY RIGHT. A MORE ACCURATE
2 TERM MIGHT BE A POPULATION REDUCING ORDER. ANY METHOD BY WHICH
3 THE POPULATION OF THE PRISON IS REDUCED IS WHAT WE ARE SEEKING.

4 WE ARE AGNOSTIC ON THE MANNER IN WHICH THAT IS DONE.
5 WHAT WE HAVE TRIED TO PRESENT TO YOU IN EVIDENCE ARE WAYS IN
6 WHICH TO ASSURE YOU THAT THESE POPULATION REDUCING MEASURES CAN
7 BE DONE SAFELY.

8 **JUDGE REINHARDT:** WELL, YOU'RE NOT ALL THAT AGNOSTIC
9 BECAUSE YOU WANT US TO PUT IN THE ORDER THAT WHEN THE STATE
10 COMES UP WITH A PLAN, THEY HAVE TO CONSULT WITH YOU, BECAUSE
11 YOU WOULDN'T WANT THEM TO CONSULT WITH YOU IF YOU DIDN'T HAVE
12 ANY VIEWS.

13 **MR. SPECTER:** FAIR ENOUGH.

14 LET ME TELL YOU WHY THAT I BELIEVE THE EVIDENCE SHOWS
15 THAT THESE POPULATION REDUCING MEASURES CAN BE DONE SAFELY.

16 FIRST OF ALL, AS JUDGE KARLTON MENTIONED, PRISONS IN
17 THEIR CURRENT CONDITION ARE THEMSELVES CRIMINOGENIC. IN OTHER
18 WORDS, THEY ARE THEMSELVES ENHANCING CRIME.

19 SECOND OF ALL, THERE IS NO DISPUTE IN THE RECORD THAT
20 THE LENGTH OF INCARCERATION HAS AN EFFECT ON THE CRIME RATE.
21 THEREFORE, IF PRISONERS WERE TO GET A FEW MORE MONTHS' WORTH OF
22 CREDIT, THERE WOULD BE NO EFFECT ON THE CRIME RATE WHETHER THEY
23 STAYED IN PRISON A FEW MONTHS EARLIER OR LONGER.

24 THIRD, THE NUMBER OF PAROLEES. I THINK WE HAVE
25 PROVED WITHOUT CONTRADICTION THAT THE NUMBER OF PAROLEES IN THE

1 COMMUNITY IS NOT CORRELATED WITH THE CRIME RATE. IN FACT, IN
2 MANY COMMUNITIES SUCH AS FRESNO, FOR EXAMPLE, THE NUMBER OF
3 PAROLEES HAS INCREASED WHILE THE POLICE CHIEF IS BOASTING THAT
4 THE CRIME RATE HAS DROPPED TO ITS LOWEST LEVEL IN 40 SOME-ODD
5 YEARS.

6 AGAIN -- AND PART OF THE REASON FOR THIS IS THAT
7 PAROLEES MAKE UP A VERY, VERY SMALL FRACTION OF THE NUMBER OF
8 PEOPLE WHO ARE ARRESTED.

9 IN CALIFORNIA THERE ARE 1.5 MILLION ARRESTS AND OUT
10 OF THAT ONLY ABOUT 90,000, OR 6 PERCENT, ARE PAROLEES. AND
11 THOSE INCLUDE ARRESTS FOR PAROLE VIOLATIONS, WHICH ARE NOT
12 NECESSARILY CRIMES, AND FOR MISDEMEANORS.

13 SO WHEN ONE MEASURES THE IMPACT OF SOME MORE
14 PRISONERS ON A COMMUNITY, I BELIEVE, YOUR HONOR, IT'S
15 APPROPRIATE TO SAY THAT THE COUNTIES' AND INTERVENOR'S CONCERNS
16 ARE EXAGGERATED BECAUSE IT'S A FAIRLY SMALL NUMBER WE ARE
17 TALKING ABOUT.

18 AND I REALLY -- IF IT DID -- YOU KNOW, YOU MENTIONED
19 SEVERAL TIMES IN THE TRIAL ABOUT THE EFFECT OF THE ORDER AND
20 THE RESPONSIBILITY THAT YOU BEAR IN DECIDING WHAT THE ORDER IS
21 AND ISN'T.

22 I HAVE ALSO A RESPONSIBILITY AS AN OFFICER OF THE
23 COURT AND AS A CITIZEN OF CALIFORNIA IN MAKING A PROPOSAL. AND
24 I BELIEVE THE EVIDENCE SHOWS THAT I WOULDN'T BE UP HERE ARGUING
25 THAT IF WE WERE GOING TO -- IF WE ASKED FOR A RELEASE OF 52,000

1 PRISONERS OVER, YOU KNOW, A COURSE OF TWO YEARS AND IT WAS
2 GOING TO HAVE A PROFOUND EFFECT ON PUBLIC SAFETY, I'M NOT SURE
3 I WOULD BE HERE TODAY.

4 I THINK WHAT THE EVIDENCE SHOWS IS THAT THE RELEASE
5 OF PRISONERS WILL CHANGE THE TIME AND CIRCUMSTANCES OF THE
6 OFFENSE, BUT NOT THE NUMBER OF THE OFFENSES.

7 AND WHAT'S INSTRUCTIVE WHEN YOU READ THE LAW
8 ENFORCEMENT INTERVENOR'S FINDINGS, PROPOSED FINDINGS AND
9 CONCLUSIONS WHICH WERE FILED ON FRIDAY, IT'S VERY INSTRUCTIVE
10 BECAUSE THEY MAKE MUCH OF THE FACT THAT IF THESE PRISONERS WERE
11 RELEASED IN AN ACCELERATED WAY, QUOTE, EARLY, THEY WILL COMMIT
12 CRIMES. SO THERE IS NO DOUBT ABOUT THAT. WE AGREE WITH THAT.

13 BUT NOWHERE DO THEY CONTRADICT THE EVIDENCE THAT THE
14 TOTAL NUMBER OF CRIMES OVER TIME WILL NOT INCREASE OR THAT THE
15 CRIME RATE WILL NOT INCREASE.

16 AND, IN FACT, EVEN THEIR PROPOSED FINDINGS SUPPORT
17 THIS CONCLUSION, SINCE THEY SAY THAT THE OFFENDERS WILL RETURN
18 TO PRISON AT THE SAME EXACT RATE AS THEY DO NOW.

19 AND PERHAPS THE MOST -- THESE ARE ALL STATISTICS AND
20 THEY ARE SOMEWHAT DRY, BUT I THINK VERY MEANINGFUL. BUT IF
21 THERE WAS EVER ANY DOUBT ABOUT THESE STATISTICS, I THINK THE
22 MOST PERSUASIVE EVIDENCE ON THIS SUBJECT COMES FROM THE PEOPLE
23 WHO HAVE DONE IT BEFORE.

24 YOU HAVE HEARD FROM FOUR EXPERIENCED CORRECTIONAL
25 ADMINISTRATORS WHO DO OR HAVE DIRECTED FIVE DIFFERENT

1 CORRECTIONAL SYSTEMS. AND THEY TESTIFIED, WITHOUT DISPUTE,
2 THAT THE PRISONER POPULATIONS CAN BE REDUCED WITHOUT ANY
3 ADVERSE EFFECT ON PUBLIC SAFETY.

4 OF THESE, DR. BEARD, MR. LEHMAN AND SHERIFF
5 HENNESSEY'S TESTIMONY SUPPORT THE NOTION THAT POPULATIONS CAN
6 BE REDUCED WITHOUT SUCH AN EFFECT.

7 AND THERE IS NO EVIDENCE THAT THE EXPERIENCE IN
8 PENNSYLVANIA, WASHINGTON OR SAN FRANCISCO WOULD BE ANY
9 DIFFERENT IF THE COURT WERE TO MAKE THESE ORDERS.

10 IN ADDITION, DR. KRISBERG'S TESTIMONY SOMEWHAT FLEW
11 UNDER THE RADAR IN THE PROPOSED FINDINGS AND CONCLUSIONS; NOT
12 OURS, BUT THE OTHER SIDE'S. AND HE STUDIED WHAT ACTUALLY
13 HAPPENED WHEN JURISDICTIONS ACCELERATED THE RELEASE OF
14 PRISONERS.

15 AND AS I MENTIONED BEFORE, THERE ARE 24 COUNTIES HE
16 STUDIED, NINE STATES, CANADA, PHILADELPHIA, AND THE CRIME RATE
17 DIDN'T INCREASE IN ONE OF THEM. NOW, I THINK THAT TELLS YOU A
18 LOT ABOUT THE IMPACT OF RELEASING PRISONERS.

19 DR. AUSTIN SUPPORTED THE RELEASE. HE HAS DONE THIS
20 BEFORE IN MANY OTHER JURISDICTIONS. HE LAID OUT A ROAD MAP FOR
21 HOW THE STATE COULD DO IT, IF IT SO CHOOSES. AND EACH ONE OF
22 THE MEASURES THAT HE USES ARE SIMILAR TO THOSE OF GOVERNOR AND
23 THE GOVERNOR'S OWN EXPERT PANEL.

24 NOW, THE LAW ENFORCEMENT INTERVENORS PARTICULARLY,
25 AND ALL OF THE DEFENDANTS AND DEFENDANT INTERVENORS TO A

1 CERTAIN EXTENT, MAINTAIN INCONSISTENT POSITIONS.

2 ON THE ONE HAND THEY SAY YOU SHOULDN'T RELEASE
3 PRISONERS BECAUSE THAT WOULD HAVE AN OVERWHELMINGLY BAD EFFECT
4 ON PUBLIC SAFETY. AND ON THE OTHER HAND, THEY ALL SAY THERE
5 ARE PROGRAMS THAT YOU CAN DO THAT CAN BE DONE SAFELY TO REDUCE
6 THE PRISON POPULATION.

7 AND THEY ARE LISTED IN, YOU KNOW, THINGS SUCH AS DRUG
8 COURT, SENATE BILL 618 IN SAN DIEGO, INTENSIVE PAROLE AND
9 PROBATION SUPERVISION, MENTAL HEALTH SERVICES AND THE LIKE.

10 NOW, THOSE ARE UNDER THE DEFINITION OF A PRISONER
11 RELEASE ORDER. UNDER THE PLRA, THOSE WOULD BE PRISONER RELEASE
12 ORDERS IF YOU ORDERED THAT.

13 AND I BELIEVE THEY ALSO STAND FOR THE PROPOSITION
14 THAT YOU CAN IMPLEMENT PROGRAMS FOR PRISONERS THAT WOULD BOTH
15 REDUCE THE CROWDING AND NOT HAVE ANY -- WELL, NOT ONLY WILL IT
16 NOT HAVE IMPACT ON PUBLIC SAFETY, BUT I THINK THE EVIDENCE IS
17 UNCONTRADICTED THAT IT WILL IMPROVE PUBLIC SAFETY.

18 **JUDGE HENDERSON:** I WAS BOTHERED WITH THIS IN THE
19 TRIAL AND I CONTINUE TO BE BOTHERED.

20 THE GOVERNOR SAID TWICE, TO MY KNOWLEDGE, LAST WEEK,
21 YOU AIN'T GOING TO GET ANY MONEY FROM THE GOVERNOR, THE
22 CONTROLLER, OR THE LEGISLATURE.

23 SO WHAT DO WE DO WITH THESE WONDERFUL PROGRAMS IF
24 THERE IS NO MONEY FOR IT? AND CAN WE ORDER MONEY FOR IT?

25 THIS IS ALL ABOUT MONEY IN MY VIEW. HOW DO WE DEAL

1 WITH THAT?

2 **MR. SPECTER:** WELL, IF I UNDERSTAND YOUR QUESTION
3 CORRECTLY, YOU ARE REFERRING TO THE GOVERNOR'S STATEMENTS THAT
4 HE WASN'T GOING TO SPEND MONEY FOR THE 10,000-BED PROJECT. IS
5 THAT WHAT YOU ARE --

6 **JUDGE HENDERSON:** I READ IT BEYOND THAT. BUT, YEAH,
7 NOT GOING TO SPEND MONEY FOR...

8 **MR. SPECTER:** FOR ALL THESE OTHER. WELL, FIRST OF
9 ALL --

10 **JUDGE REINHARDT:** ARE YOU FAMILIAR WITH THE
11 GOVERNOR'S STATEMENTS?

12 **MR. SPECTER:** PARDON ME?

13 **JUDGE REINHARDT:** ARE YOU FAMILIAR WITH THE
14 GOVERNOR'S STATEMENTS THAT JUDGE HENDERSON IS REFERRING TO?

15 **MR. SPECTER:** GENERALLY, YES.

16 **JUDGE REINHARDT:** AND DID YOU READ THEM AS JUDGE
17 HENDERSON? I'M ASKING A NAIVE QUESTION, UNINFORMED QUESTION.

18 JUDGE HENDERSON READS THOSE STATEMENTS AS APPLYING TO
19 ANY FUNDING UNDER ANY CIRCUMSTANCES FOR THESE TYPES OF ACTIONS,
20 AND TO SOME EXTENT THAT COULD BE CORRECTED WITH THE STATEMENT
21 THAT WE COULD REDUCE THE AMOUNT OF THE BUDGET THAT COULD BE
22 SPENT ON PRISON REFORM.

23 OR DO YOU READ THE STATEMENTS THAT THE GOVERNMENT
24 MADE AS REFERRING ONLY TO GIVING THE MONEY TO THE RECEIVER FOR
25 THOSE PROGRAMS?

1 **MR. SPECTER:** MY RECOLLECTION --

2 **JUDGE REINHARDT:** I REALLY SHOULDN'T BE ASKING YOU.
3 I SHOULD BE ASKING THE STATE, WHO REALLY REPRESENTS THE
4 GOVERNOR --

5 **JUDGE KARLTON:** GOD KNOWS THEY DO.

6 **JUDGE REINHARDT:** -- WHAT THE GOVERNOR MEANS BY THOSE
7 STATEMENTS.

8 **MR. SPECTER:** YES, YOUR HONOR. BUT SINCE I'M HERE, I
9 WILL ANSWER.

10 **JUDGE REINHARDT:** OF COURSE.

11 **MR. SPECTER:** I READ THE GOVERNOR'S REMARKS IN A MORE
12 NARROW SENSE, THAT HE WASN'T GOING TO GIVE ANY MONEY TO
13 MR. KELSO FOR HIS PROJECT. I DON'T KNOW WHETHER THAT'S
14 CORRECT. I WOULD HAVE TO REREAD THEM, BUT THAT'S MY
15 RECOLLECTION.

16 THE OTHER IMPORTANT POINT ABOUT THIS --

17 **JUDGE REINHARDT:** CAN I JUST SUGGEST THAT WHEN THE
18 STATE GIVES ITS PRESENTATION, SOMEBODY TRY TO TELL US WHETHER
19 THE GOVERNOR'S POSITION RELATES JUST TO THE RECEIVER OR TO
20 EXPENDITURE OF FUNDS.

21 **JUDGE KARLTON:** I HAD ANOTHER QUESTION ALONG THE LINE
22 THAT'S DEALING WITH THAT.

23 THE STATE HAS THIS INCREDIBLY SERIOUS FINANCIAL
24 PROBLEM. ALL THE STATES DO, BUT CALIFORNIA IS WHAT I'M TALKING
25 ABOUT. APPARENTLY, TEXAS DOESN'T, WHICH IS VERY STRANGE.

1 BUT ANYHOW, ONE THING THAT THE STATE MIGHT SAY -- I
2 DON'T KNOW WHO SPEAKS FOR THE STATE, BUT SOMEBODY SOME DAY WHO
3 ACTUALLY SPEAKS FOR THE STATE COULD SAY, LOOK, WE ARE BROKE.
4 YES, WE WILL SAVE A LOT OF MONEY BY RELEASING PRISONERS. BUT
5 YOU KNOW WHAT? THAT'S MONEY THAT WE NEED TO DEAL WITH THIS
6 INCREDIBLE DEFICIT THAT WE HAVE.

7 IS THAT AN APPROPRIATE CONCERN OF THIS COURT OR,
8 AGAIN, IS IT -- YOU KNOW, YOU CAN LOCK UP THE WHOLE POPULATION
9 IF YOU WANT TO AS LONG AS YOU CAN PAY FOR IT AND IF YOU CAN'T
10 PAY FOR IT, YOU'VE GOT TO LET THEM GO.

11 **MR. SPECTER:** WELL, IT DEPENDS WHAT YOU MEAN BY
12 "CONCERN." OF COURSE, IT'S AN APPROPRIATE MATTER THAT YOU
13 SHOULD THINK ABOUT AND BE CONCERNED ABOUT. ANY RESPONSIBLE
14 PERSON WOULD.

15 WHETHER IT'S A DECISION THAT YOU CAN MAKE, I THINK
16 ESSENTIALLY HOW TO ALLOCATE MONEY IN THE STATE IS A POLITICAL
17 DECISION.

18 **JUDGE REINHARDT:** THAT'S THE QUESTION YOU'RE GOING TO
19 RESERVE FOR LATER.

20 **MR. SPECTER:** YOU GOT ME.

21 BUT I REALLY DO THINK THAT, YOU KNOW, AS THE EVIDENCE
22 SHOWS, THAT IF YOU REDUCE THE POPULATION BY 50,000, YOU WOULD
23 SAVE APPROXIMATELY A BILLION DOLLARS A YEAR.

24 NOW, ONE COULD ALLOCATE THIS MONEY TO THE COUNTIES,
25 AS I WOULD RECOMMEND IF I WERE THE DECIDER ON THESE ISSUES, OR

1 THEY COULD SAY, NO, PUBLIC SAFETY ISN'T AS IMPORTANT AS SOME
2 OTHER PROGRAM, WHATEVER IT MAY BE. THERE ARE LOTS OF THEM IN
3 CALIFORNIA.

4 AND SO I THINK, IN ESSENCE, THE SUPREME COURT HAS
5 DIRECTED THAT THE STATE GETS TO MAKE THAT CHOICE, BUT IT IS A
6 CHOICE THAT THE STATE MAKES. THE STATE DECIDES THE LEVEL OF
7 PUBLIC SAFETY THAT IT WANTS FOR ITS CITIZENS AND IF IT WANTS TO
8 SPEND 80 PERCENT OF ITS REVENUE ON PUBLIC SAFETY, THEN THAT'S
9 WHAT IT DOES. IF IT WANTS TO SPEND 20 PERCENT --

10 **JUDGE REINHARDT:** WE ARE BACK TO WHERE WE STARTED.
11 BUT THEN LET'S ASSUME WE CONCLUDE IF THEY DON'T SPEND MONEY ON
12 THEM AND JUST RELEASE THEM, THEN THAT IS A THREAT TO PUBLIC
13 SAFETY. BUT IF THEY DO IT PROPERLY, IT'S NOT.

14 **MR. SPECTER:** RIGHT.

15 **JUDGE REINHARDT:** SO THAT'S WHY YOU WANT TO RESERVE
16 YOUR ANSWER.

17 **MR. SPECTER:** WELL, I AM STILL GOING TO RESERVE IT
18 BECAUSE I BELIEVE THAT THE POLITICAL FORCES WILL NOT ALLOW THE
19 GOVERNOR TO RELEASE 50,000 AXE MURDERERS.

20 **JUDGE REINHARDT:** NO. HE WILL TELL THEM TO KEEP THEM
21 LOCKED UP.

22 **MR. SPECTER:** RIGHT. AND SO HE WILL HAVE TO RELEASE
23 SOME.

24 **JUDGE REINHARDT:** WELL, THEN MAYBE WE CAN'T RELEASE
25 SOME.

1 **MR. SPECTER:** HUH?

2 **JUDGE REINHARDT:** MAYBE WE CAN'T. MAYBE THEN IT'S
3 TOO GREAT A THREAT TO THE PUBLIC SAFETY.

4 **MR. SPECTER:** NO, THAT IS NOT TRUE. THE EVIDENCE
5 SHOWS THAT YOU CAN RELEASE --

6 **JUDGE REINHARDT:** NO. I SAID DESPITE YOUR ARGUMENTS
7 ABOUT THE EVIDENCE. IF THE COURT IS NOT PERSUADED THAT SOMEHOW
8 THE MORE PRISONERS YOU RELEASE, THE GREATER THREAT TO THE
9 PUBLIC SAFETY, IF WE WERE NOT PERSUADED BY THAT ARGUMENT, THEN,
10 ON THE OTHER HAND, WE MIGHT SAY, WELL, WE CAN'T RELEASE ANY
11 BECAUSE IT'S TOO GREAT A THREAT TO THE PUBLIC SAFETY.

12 **JUDGE KARLTON:** DR. AUSTIN SAID, IF YOU RECALL, AT
13 CROSS-EXAMINATION, DOCTOR, YOU'VE GOT THIS PLAN WHICH IS
14 REALITY TERRIFIC AND WILL TAKE CARE OF ALL THESE PROBLEMS, BUT
15 IF THE PLAN WERE NOT EXECUTED, YOU WOULD OPPOSE THE PROGRAM,
16 THE RELEASE OF PRISONERS, BECAUSE IT WOULD BE CHAOTIC.

17 AND I DON'T KNOW THAT HE AGREED WITH THE FIRST
18 STATEMENT, BUT HE DID SAY IT WOULD BE CHAOTIC.

19 **MR. SPECTER:** I THINK THAT'S WHAT HE MEANT BY THAT.
20 WHAT I'M TAKING YOUR QUESTION TO MEAN IS THAT HE WOULDN'T -- I
21 RECALL THAT DISCUSSION AND I BELIEVE HE WAS REFERRING TO THE
22 FACT THAT IF YOU OPEN THE DOOR TO LET 52,000 PEOPLE OUT, LIKE
23 SOME OF THE PEOPLE HAVE CHARACTERIZED WHAT WE ARE TRYING TO DO,
24 WHICH WE ARE NOT, THEN IT WOULD BE A CHAOTIC SITUATION.

25 BUT IF YOU DO IT IN A, QUOTE, SCIENTIFIC WAY, I THINK

1 IT WOULDN'T BE CHAOTIC AND IT WOULD BE SAFE.

2 BUT, YOU KNOW, THE EVIDENCE, JUDGE, TO GET BACK TO
3 YOUR EARLIER POINT -- I'M SORRY TO KEEP GOING BACK TO THE
4 EVIDENCE, BUT THE EVIDENCE IS THAT WITHOUT A DIME MORE TO THE
5 LOCAL COMMUNITIES, THIS WOULD NOT HAVE AN ADVERSE IMPACT ON
6 PUBLIC SAFETY. WITHOUT A DIME. SO I THINK --

7 **JUDGE KARLTON:** YOUR ARGUMENT IS WE OUGHT TO JUST
8 OPEN THE PRISON AND LET EVERYBODY OUT BECAUSE IT'S NOT GOING TO
9 AFFECT PUBLIC SAFETY AT ALL.

10 **MR. SPECTER:** NO. MY ARGUMENT IS THAT IF YOU DO IT
11 IN THE METHODS THAT WE'VE DESCRIBED AND PUT FORWARD, IT
12 WOULDN'T HAVE ANY IMPACT ON PUBLIC SAFETY.

13 **JUDGE KARLTON:** THAT'S THE PROBLEM.

14 **MR. SPECTER:** IT'S A CIRCLE. I UNDERSTAND.

15 **JUDGE REINHARDT:** SUPPOSE THE STATE DOESN'T WANT TO
16 DO IT.

17 **MR. SPECTER:** PARDON ME?

18 **JUDGE REINHARDT:** WHAT IF THE STATE DOESN'T WANT TO
19 DO IT THE WAY YOU DESCRIBED, THEN IT IS A THREAT TO PUBLIC
20 SAFETY.

21 **MR. SPECTER:** THEN WE'LL HAVE TO DEAL WITH THAT IN
22 THE EVIDENTIARY HEARING ON THE INJUNCTION. I CAN'T SAY
23 ANYMORE. I DON'T HAVE A BETTER ANSWER FOR YOU ON THAT.

24 **JUDGE HENDERSON:** LET ME ASK YOU ABOUT THE EVIDENCE.
25 YOU MENTIONED THIS SEVERAL TIMES RECENTLY HERE, 50,000 AND

1 53,000.

2 WHAT EVIDENCE IN THE RECORD ESTABLISHES THAT
3 130 PERCENT OF THE TIME THAT THAT IS THE MAGIC NUMBER AT THOSE
4 CONSTITUTIONAL LEVELS OF MEDICAL AND MENTAL HEALTH THAT CAN BE
5 PROVIDED? WHAT IN THE RECORD GIVES THIS NUMBER?

6 **MR. SPECTER:** SURE. WELL, WE TOOK THAT NUMBER FROM
7 THE DEFENDANTS' OWN DOCUMENTS AND THEIR OWN DEPOSITION
8 TESTIMONY. THEY HAD A FACILITIES MASTER PLAN, WHICH IS A
9 DOCUMENT WHICH THEY USED TO PLAN THEIR CONSTRUCTION OF
10 FACILITIES OVER A FIVE-YEAR PERIOD. THEY USED THE 130 PERCENT
11 FIGURE IN THAT DOCUMENT.

12 MISS HYSEN, WHO IS IN CHARGE OF THE CONSTRUCTION,
13 TESTIFIED AT DEPOSITION THAT SHE BELIEVED 130 PERCENT WAS
14 APPROPRIATE. THE STRIKE TEAM WHICH THE STATE FORMED, WHICH
15 MR. LEHMAN WHO TESTIFIED HERE WAS PART OF, ENDORSED THE 130
16 PERCENT NUMBER.

17 AND EVERY EXPERT WHO TESTIFIED, DR. BEARD,
18 MISS WOODFORD, MR. LEHMAN, DR. STEWART, DR. HANEY, THEY ALL
19 BELIEVED THAT 130 PERCENT WOULD ALLOW THE STATE SUFFICIENT ROOM
20 TO RUN THEIR MEDICAL SYSTEM --

21 **JUDGE KARLTON:** WITH ALL DUE RESPECT, IT HAS BEEN
22 TROUBLING FROM THE DAY THIS CASE ENDED.

23 WHAT I REALLY UNDERSTAND IS YOU NEED 96 PERCENT OF --
24 OR I THINK THAT WAS THE NUMBER -- OF DESIGN CAPACITY TO BE ABLE
25 TO PUT PEOPLE IN APPROPRIATE CLASSIFICATION, MUCH LESS GIVE

1 THEM TREATMENT.

2 MY BEST UNDERSTANDING OF WHAT THE TESTIMONY IS, IS
3 THE 130 PERCENT IS A KIND OF RECOGNITION OF THE POLITICAL
4 REALITY. AND THAT IS VERY TROUBLING.

5 AGAIN, IS THAT SOMETHING THAT WE OUGHT TO CONSIDER,
6 CAN CONSIDER, SHOULD CONSIDER?

7 **MR. SPECTER:** WELL, YOUR HONOR, I THINK IT'S
8 IMPORTANT -- IT'S SOMETHING -- YOU CAN CONSIDER THE TESTIMONY
9 OF OTHER FORMER HEADS OF CORRECTIONS ABOUT WHAT THEY BELIEVE IS
10 APPROPRIATE. I THINK THAT'S SOMETHING THAT'S VERY PERSUASIVE
11 AND CREDIBLE.

12 SECOND OF ALL, IF YOU READ OUR PROPOSAL CAREFULLY,
13 AND YOU MIGHT HAVE MISSED IT IN ALL THE WORDS, WE ARE URGING
14 130 PERCENT FOR, YOU KNOW, SYSTEM-WIDE, BUT THAT THE
15 SPECIALIZED PROGRAMS HAVE TO BE BELOW THEIR PERCENTAGE.

16 **JUDGE KARLTON:** WHAT THAT REALLY MEANS -- I WANT YOU
17 TO STOP AND THINK ABOUT WHAT WE ARE ORDERING IF WE WERE TO DO
18 WHAT YOU SUGGESTED.

19 THAT MEANS THERE WOULD BE MEDICAL FACILITIES AND
20 MENTAL HEALTH FACILITIES WHICH WOULD BE AT 95 PERCENT OR LESS
21 AND THERE WOULD BE OTHER PRISONS WHICH WOULD BE UP TO
22 200 PERCENT AGAIN, AND WE WOULD HAVE BAD BEDS AGAIN.

23 THE ONLY THING IS WE WOULD BE PROTECTING THE CLASS
24 MEMBERS. AND MAYBE THAT'S THE APPROPRIATE THING TO DO. I
25 MEAN, THAT'S WHAT THIS CASE IS ABOUT, BUT IT WOULD BE -- IT

1 WOULD BE DIFFICULT FOR ME TO SAY YES, AND THE HELL WITH
2 EVERYBODY ELSE.

3 **MR. SPECTER:** WELL, AGAIN, I THINK THAT'S -- THAT'S A
4 VERY IMPORTANT CONCERN AND I THINK THAT IS A CONCERN THAT WOULD
5 NEED TO BE ADDRESSED IN THE STATE'S PLAN. BECAUSE IF -- YOU'RE
6 RIGHT. IF THEY WANTED TO OVERFLOW -- OVERCROWD ONE INSTITUTION
7 IN ORDER TO UNDERCROWD ANOTHER, I THINK THAT WOULD BE A
8 PROBLEM.

9 AND I WOULD HOPE THAT AFTER THIS TESTIMONY AND IF WE
10 WERE ABLE TO GET THE KIND OF ORDER FROM YOU WHICH WE ARE
11 SEEKING, THAT THAT WOULDN'T HAPPEN; BUT IF THEY DO, WE WILL
12 ADDRESS IT.

13 **JUDGE REINHARDT:** LET ME ASK YOU THE QUESTION. WHAT
14 IS YOUR CO-COUNSEL GOING TO ARGUE? THERE ARE AREAS --

15 **JUDGE KARLTON:** HE'S GOING TO DO THE MENTAL HEALTH.

16 **JUDGE REINHARDT:** WELL, THE PROBLEM WE ARE TALKING
17 ABOUT IN GENERAL SO FAR.

18 BUT DOES HE HAVE ANY PARTICULAR SUBJECTS, OTHER THAN
19 THE FACT THAT IT'S MENTAL HEALTH INSTEAD OF ORDINARY HEALTH?

20 **JUDGE KARLTON:** PHYSICAL HEALTH.

21 **MR. SPECTER:** NO, NOT -- I CAN PROVIDE YOU SOME --

22 **JUDGE REINHARDT:** LET HIM JUST --

23 **JUDGE KARLTON:** LET MR. BIEN --

24 **JUDGE REINHARDT:** MAYBE WE WILL TAKE A MORNING RECESS
25 BEFORE THAT. I WANT YOU TO BE PREPARED TO ANSWER THE QUESTION

1 YOU ARE RAISING WITH COUNSEL.

2 (WHEREUPON THERE WAS A RECESS IN THE PROCEEDINGS
3 FROM 11:12 UNTIL 11:33 A.M.)

4 **JUDGE KARLTON:** MR. BIEN, I WANT YOU TO KNOW ALL
5 THREE JUDGES ARE VERY CONCERNED ABOUT THIS 130, 96, WHERE ALL
6 THOSE NUMBERS COME FROM, WHETHER THEY MAKE ANY DIFFERENCE, WHAT
7 THEY REALLY MEAN. I WOULD LIKE YOU TO HELP US, IF YOU WILL.

8 **CLOSING ARGUMENT**

9 **MR. BIEN:** WE OFFERED TESTIMONY, YOUR HONOR, THAT --
10 AND VERY POWERFUL TESTIMONY FROM THE INTERVENORS IN RUNNING
11 THEIR OWN CORRECTIONAL FACILITIES AS TO HOW DIFFICULT IT WAS
12 FOR THEM TO MANAGE A CORRECTIONAL FACILITY APPROPRIATELY
13 WITHOUT EMPTY SPACE. WE HEARD THAT 90 PERCENT IS FULL,
14 95 PERCENT IS FULL OR 85 PERCENT IS FULL.

15 AND THE REASON IS, TO MANAGE A CORRECTIONAL FACILITY
16 APPROPRIATELY ONE REQUIRES FLEXIBILITY IN CLASSIFICATION TO
17 MOVE PEOPLE, THE APPROPRIATE SECURITY LEVEL, APPROPRIATE
18 FACILITY FOR HEALTHCARE, MENTAL HEALTH CARE.

19 IN LOOKING AT HOW CALIFORNIA HAS BEEN MANAGING ITS
20 SYSTEM AND AT HOW OTHER STATES HAVE MANAGED THEIR SYSTEMS, THE
21 EVIDENCE SHOWS THAT ONE CAN MANAGE CALIFORNIA'S SYSTEM AT A
22 LEVEL ABOVE 100 PERCENT OF DESIGN CAPACITY DESPITE THIS,
23 BECAUSE DESIGN CAPACITY, AS WE UNDERSTAND, IS A SINGLE CELLING
24 CAPACITY. AND THERE IS SOME DOUBLE CELLING THAT HAS BEEN
25 DESIGNED IN. THERE'S SOME DOUBLE CELLING THAT IS TOLERABLE.

1 WE ARE AT SUCH AN EXTREME NOW, YOUR HONOR, BEYOND ALL
2 -- BEYOND THE HISTORY OF CORRECTIONAL OPERATIONS. WE PUT ON
3 TESTIMONY --

4 **JUDGE KARLTON:** WE KNOW THAT. WE KNOW THAT. THE
5 PROBLEM IS YOU WANT -- LET'S PUT THE -- I'M SORRY. I DON'T
6 MEAN TO BE -- WELL, MAYBE I AM. IT'S A VERY SERIOUS PROBLEM.

7 OUR CONCERN IS PROVIDING ADEQUATE MEDICAL AND MENTAL
8 HEALTH. MISTER -- I'M DOING WELL. THAT OTHER FELLOW.

9 **MR. SPECTER:** SPECTER.

10 **MR. BIEN:** THAT GUY (INDICATING).

11 (LAUGHTER.)

12 **JUDGE KARLTON:** YEAH, THAT GUY. ACKNOWLEDGED THAT
13 YOUR PROPOSAL RECOGNIZES THE NEED FOR MORE LIMITED SPACE FOR
14 MENTAL HEALTH AND PHYSICAL HEALTH FACILITIES, ALTHOUGH WE
15 HAVEN'T BEEN TOLD EXACTLY WHAT THAT MEANS.

16 I DO NOT KNOW, CONTRARY TO WHAT COUNSEL HAS SAID,
17 THAT THE 130 IS SUPPORTABLE IN ANY FASHION OTHER THAN SAYING
18 THE BEST WE CAN GET. BUT IT IS CLEAR THAT IF IT'S 130 OVERALL
19 AND WE'RE TRYING TO ENSURE ADEQUATE MEDICAL AND MENTAL HEALTH,
20 IT MEANS THEY GET SOME OTHER FIGURE -- 95, 96 PERCENT,
21 WHATEVER -- AND WE ARE BACK WITH 200 PERCENT FOR EVERYBODY
22 ELSE.

23 **MR. BIEN:** WELL, LET ME GIVE YOU SOME NUMBERS THAT
24 WILL REASSURE YOU ABOUT THAT.

25 OUR REFERENCE TO SPECIALIZED MEDICAL MENTAL HEALTH

1 PROGRAMS, AT THE MOMENT -- UNFORTUNATELY, FOR THE PLATA
2 CLASS -- THERE ARE NO SPECIALIZED BEDS FOR MEDICAL CARE,
3 BESIDES THE CTC'S, THE CORRECTIONAL TREATMENT CENTERS, AND
4 THERE ARE ONLY A COUPLE HUNDRED OF THOSE BEDS.

5 SO WE ARE TALKING ABOUT -- THE ONLY SPECIALIZED BEDS
6 THAT NOW EXIST ARE THE MENTAL HEALTH SPECIALIZED BEDS. THERE
7 ARE CURRENTLY --

8 **JUDGE KARLTON:** OF WHICH THERE ARE PRESENTLY
9 SOMETHING LIKE 400 OR 500 SHORT.

10 **MR. BIEN:** THERE'S 4,000 EOP BEDS RIGHT NOW. THERE
11 NEEDS TO BE 5,000. AND THERE ARE, YOU KNOW, SEVERAL HUNDRED
12 MENTAL HEALTH CRISIS BEDS THAT ARE PART OF THOSE CTC'S. AND
13 THEN THERE ARE THE DMH BEDS, AGAIN, ONLY IN THE HUNDREDS.

14 SO EVEN IF THOSE BEDS WERE KEPT AT 95 PERCENT --
15 AND, BY THE WAY, RIGHT NOW THEY ARE ALREADY, MANY OF THEM ARE
16 KEPT --

17 **JUDGE KARLTON:** OVER?

18 **MR. BIEN:** EXCEPT FOR THE EOP. EOPS ARE OVERCROWDED.
19 THEY ARE SUPPOSED TO BE KEPT AT 150 PERCENT NOW UNDER THE
20 CURRENT STANDARDS.

21 SO, IN OTHER WORDS, WE ARE NOT TALKING ABOUT A
22 TREMENDOUS NUMBER OF BEDS THAT WOULD BE AT THE 95 PERCENT IN
23 SPECIALIZED MEDICAL PROGRAMS.

24 ASSUMING FOR A MOMENT THAT THE SURPRISE THAT HAPPENED
25 IN THE MIDDLE OF OUR TRIAL DIDN'T HAPPEN AND THAT WE WERE GOING

1 TO BE BUILDING 10,000 ABSOLUTELY NECESSARY MEDICAL MENTAL
2 HEALTH BEDS, THOSE WERE ALSO PLANNED NOT TO BE OVERCROWDED.
3 AND I THINK WE WOULD AGREE AND YOU WOULD AGREE, RECEIVER AND
4 MEDICAL PEOPLE AND THE STATE OFFICIALS THAT WORKED ON THOSE
5 BEDS ALSO WOULD AGREE THAT THOSE SHOULD NOT BE OVERCROWDED.

6 BUT WE ARE NOT CONTEMPLATING -- AND WE THINK, WE
7 AGREE, IT WOULD BE INAPPROPRIATE TO BE OPERATING ANY FACILITIES
8 AT 200 PERCENT, BUT WE THINK AT 130 PERCENT THERE WOULD STILL
9 BE -- WHILE THERE MIGHT BE SOME FACILITIES THAT COULD OPERATE A
10 LITTLE HIGHER THAN THAT, IT WOULD STILL BE AN OPERABLE
11 CAPACITY.

12 **JUDGE REINHARDT:** WELL, THERE ARE TWO QUESTIONS HERE
13 I THINK.

14 ONE, JUDGE KARLTON ASKED A QUESTION AS TO: IS THERE
15 EVIDENCE TO SUPPORT ANY PARTICULAR FIGURE?

16 AND, SECONDLY, THE QUESTION IS: SHOULD THERE BE A
17 LIMIT, FOR EXAMPLE? JUST SUPPOSE WE SIT AT 130 PERCENT. ARE
18 YOU SUGGESTING THE STATE COULD PUT 200 PERCENT AT SOME PLACES
19 AND GET -- END UP WITH AN AVERAGE OF 130? SHOULD THERE THEN BE
20 SOME -- ANOTHER FIGURE THAT SAYS NO PARTICULAR INSTITUTION OR
21 FACILITY MAY EXCEED "X" PERCENT? IS THAT PART OF YOUR
22 PROPOSAL?

23 **MR. BIEN:** I THINK THAT'S RIGHT.

24 WELL, FIRST, I THINK THERE IS EVIDENCE AS TO THE
25 130 PERCENT. MR. SPECTER MENTIONED IT.

1 I WOULD ALSO POINT OUT THAT THE DUKMAJIAN COMMISSION,
2 THE INDEPENDENT REVIEW PANEL, DISCUSSED THIS CAPACITY. THEY
3 CAME UP WITH 145 PERCENT --

4 **JUDGE KARLTON:** BUT, MR. BIEN, WITH ALL DUE RESPECT
5 TO THE DUKMAJIAN COMMISSION, WHICH I THINK DESERVES A LOT OF
6 RESPECT, AS BEST I CAN TELL, IT'S NOT THAT ANYBODY IS SAYING
7 THAT WORKS WELL. IT'S THAT PEOPLE ARE SAYING, WE CAN DO THAT.
8 IT'S A POLITICAL JUDGMENT, NOT A -- NOT A CUSTODIAL JUDGMENT,
9 NOT A MEDICAL JUDGMENT.

10 AM I WRONG ABOUT IT? I WILL BE HAPPY TO BE TOLD I'M
11 WRONG ABOUT IT.

12 **MR. BIEN:** I THINK THAT EVERYONE OPERATING IN THE
13 PRISON SYSTEM IS UNDER -- ESPECIALLY IN CALIFORNIA FOR THE LAST
14 10, 20 YEARS HAS BEEN OPERATING UNDER TREMENDOUS POLITICAL AND
15 ECONOMIC PRESSURE TO OVERCROWD THE PRISONS AND THEY HAVE MADE
16 AND BEEN PUT IN -- MADE HORRIFIC, TERRIBLE DECISIONS ABOUT
17 OVERCROWDING.

18 AS THE RECEIVER IN HIS REPORT TO JUDGE HENDERSON
19 POINTED OUT, THEY JUST CHANGED THE DEFINITION AGAIN AND AGAIN
20 AS TO WHAT WAS THE MAXIMUM CAPACITY, WHAT WAS THE SAFE
21 CAPACITY, WENT UP AND UP AND UP AND WITHOUT REGARD FOR --
22 CERTAINLY, FOR HEALTHCARE, MENTAL HEALTHCARE, OR THE SAFETY OF
23 THEIR OWN CORRECTIONAL OFFICERS OR STAFF OR PRISONERS.

24 YES, THEY ARE UNDER TREMENDOUS PRESSURE. YOU KNOW, I
25 DON'T THINK THAT ANYONE CAN GUARANTEE THAT 130 PERCENT, BINGO,

1 IS GOING TO BE PERFECT MENTAL HEALTHCARE, JUST LIKE WE ARE NOT
2 ARGUING THAT A POPULATION REDUCTION IN AND OF ITSELF IS GOING
3 TO SOLVE THE PROBLEMS. THIS IS A COMPLEX SYSTEM --

4 **JUDGE REINHARDT:** WELL, LET ME ASK YOU A SIMPLE
5 QUESTION. DID YOUR EXPERTS OR ANY OF THEM TESTIFY THAT "X"
6 PERCENTAGE IS THE SAFE PERCENTAGE OR A MINIMUM SAFE PERCENTAGE
7 OR, AS JUDGE KARLTON IS SUGGESTING, THEY TESTIFIED ESSENTIALLY
8 THIS IS THE PRACTICAL LEVEL YOU CAN EXPECT TO GET IN A
9 POLITICAL SYSTEM?

10 WAS THERE ANY TESTIMONY BY EXPERTS THAT THIS IS, IN
11 FACT -- I MEAN, NOBODY KNOWS ANYTHING, OF COURSE, BUT DID ANY
12 OF THE EXPERTS SAY, "IN MY OPINION THIS IS A REASONABLY SAFE
13 PERCENTAGE."

14 **MR. BIEN:** I THINK THAT MANY OF THE EXPERTS, BOTH THE
15 CORRECTIONAL EXPERTS AND THE OTHER MENTAL HEALTH EXPERTS, DID
16 CONSIDER THESE ISSUES AND DID OFFER OPINIONS ON THE SUBJECT.
17 AND WE'VE SUMMARIZED IT IN OUR FINDINGS IN A SECTION ABOUT
18 130 PERCENT.

19 I HAVE TO SAY THAT YOU ARE TALKING ABOUT A PROCESS.
20 WE HAVE 33 DIFFERENT INSTITUTIONS. WE HAVE INSTITUTIONS BUILT
21 IN THE 19TH CENTURY. WE HAVE INSTITUTIONS BUILT IN THE LAST 10
22 YEARS. THERE ARE DIFFERENT UNITS WITH DIFFERENT MISSIONS.
23 JUST LIKE WE ARE TALKING ABOUT MEDICAL AND MENTAL HEALTH UNITS,
24 THERE'S ALSO CAMPS AND THERE'S ALSO LOW SECURITY AND HIGH
25 SECURITY.

1 THE ACTUAL NUMBER THAT WE HAVE GIVEN AS A TARGET FOR
2 THE WHOLE SYSTEM IS THE BEST JUDGMENT OF OUR EXPERTS, WHO ARE
3 CORRECTIONAL EXPERTS FROM AROUND THE COUNTRY, AS TO A NUMBER BY
4 WHICH THEY THINK THE KIND OF MEDICAL AND MENTAL HEALTH
5 PROGRAMMING IS POSSIBLE.

6 WOULD IT BE BETTER AT A LOWER NUMBER? YES. THERE IS
7 NO QUESTION IT WOULD BE BETTER AT A LOWER NUMBER, BUT WE ARE
8 NOT ASKING -- WE THINK THAT THE PRESSURE OF THE REALITIES OF
9 THE SYSTEM HAVE TO BE TAKEN INTO ACCOUNT HERE.

10 I MEAN, I CAN'T SAY THAT -- THESE ARE -- THE MEN AND
11 WOMEN WHO TESTIFIED WHO RAN SYSTEMS ALSO WERE REPORTING TO
12 GOVERNORS AND STATE LEGISLATURES. I MEAN, THERE IS NO
13 SEPARATION FROM THE POLITICAL PRESSURE HERE.

14 **JUDGE KARLTON:** YOU KNOW, ONE OF THE SCARY THINGS
15 ABOUT WHAT I'M HEARING YOU SAY IS IT MAY BE THAT YOU ARE
16 SUGGESTING THAT THIS THREE-JUDGE COURT THAT HAS A VERY SPECIFIC
17 AND LIMITED FUNCTION IS GOING TO GO ON FOREVER, LIKE JUDGE
18 HENDERSON AND MYSELF. WELL, WE WILL TRY 130 PERCENT. IF THAT
19 DOESN'T WORK OUT, WE'LL COME BACK TO THE COURT AND SAY, HOW
20 ABOUT 120 PERCENT? AND IF THAT DOESN'T WORK, WE WILL TRY 119.

21 I MEAN, THAT'S -- IF THERE IS ONE THING THAT THE PLRA
22 DOESN'T CONTEMPLATE, I THINK, IT'S SOME CONTINUING --

23 **JUDGE REINHARDT:** I CAN ASSURE YOU, THIS THREE-JUDGE
24 COURT IS NOT GOING TO GO ON THAT WAY. JUDGE HENDERSON AND
25 JUDGE KARLTON CAN SPEND THE REST OF THEIR LIVES WITH THIS

1 PROBLEM, BUT...

2 **JUDGE HENDERSON:** NOT WITHOUT YOU.

3 **JUDGE REINHARDT:** I THINK THIS IS A VERY IMPERFECT
4 SCIENCE AND THESE ARE ESTIMATES, AND I'M WILLING TO ACCEPT
5 ESTIMATES AND NOT BE ASSURED BEYOND A REASONABLE DOUBT THAT
6 IT'S REALLY GOING TO WORK.

7 WE HAVE HAD A LOT OF EXPERTS WHO HAVE GIVEN US THEIR
8 VIEWS. I THINK JUDGE KARLTON IS RIGHT, THAT THEY ARE
9 INFLUENCED TO SOME EXTENT BY LIVING IN A POLITICAL WORLD. OF
10 COURSE, WE ARE ABOVE POLITICS.

11 **JUDGE KARLTON:** OH, YES.

12 **JUDGE REINHARDT:** WE WON'T BE INFLUENCED BY THAT AND
13 WE'LL DO THE BEST WE CAN. AND IF IT DOESN'T WORK OUT, THERE
14 WILL BE ANOTHER CASE SOME DAY.

15 **MR. BIEN:** AND I THINK THAT IN DEFENDANTS' PROPOSED
16 FINDINGS AND CONCLUSIONS OF LAW THEY SAID THAT WE DIDN'T MEET
17 OUR BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THAT
18 130 PERCENT WAS GOING TO SOLVE ALL THE MEDICAL AND MENTAL
19 HEALTH PROBLEMS.

20 **JUDGE KARLTON:** AND YOU ARE WILLING TO CONCEDE THAT?

21 **MR. BIEN:** WELL, THAT IS NOT OUR BURDEN. THE CLEAR
22 AND CONVINCING EVIDENCE STANDARD APPLIES TO THE PROOF OF
23 PRIMARY CAUSE AND NO OTHER RELIEF.

24 THEN WE ARE AT A STAGE WHERE WE'RE LOOKING AT WHAT IS
25 AN APPROPRIATE INJUNCTION? WHAT IS AN APPROPRIATE REMEDY? AND

1 THERE WE ARE IN AN AREA WHERE WE HAVE ALL LIVED FOR TOO MANY
2 YEARS.

3 AND IN TERMS OF TIME, WHAT I'M HERE TO SAY IS THE WAY
4 WE CAN BRING THESE CASES TO A CONCLUSION, WHAT WE HAVE PROVEN
5 IN THIS TRIAL IS THE ONLY POSSIBLE WAY IS TO ISSUE THE ORDER
6 WE'RE REQUESTING. WE MUST GET THE POPULATION UNDER CONTROL.

7 WE HAVE TRIED EVERYTHING ELSE, AND JUDGE HENDERSON
8 AND JUDGE KARLTON HAVE TRIED EVERYTHING ELSE. THERE IS NO
9 OTHER WAY OF DOING IT. THERE IS NO OTHER POSSIBLE RELIEF,
10 WHETHER WE CALL IT RELIEF UNDER THE PLRA OR WE CALL IT SOME
11 OTHER EVENT.

12 WE HAVE PROVEN NOT ONLY THAT THE -- THAT THESE
13 PRISONS ARE CRIMINOGENIC, BUT THEY ARE PATHOGENIC. THEY ARE
14 GENERATING DISEASE AT THIS LEVEL OF OVERCROWDING.

15 AND JUDGE KARLTON POINTED US TO THE CCPOA DECISION.
16 THE GOVERNOR SAYS THE PRISONS ARE GENERATING DISEASE. THEY ARE
17 DANGEROUS FOR PUBLIC SAFETY. WE PUT THAT EVIDENCE IN THE
18 RECORD HERE MANY TIMES FROM THE GOVERNOR, BUT WE PUT IT IN THE
19 RECORD FROM OUR OWN EXPERTS, WHO ARE SAYING THAT THIS LEVEL OF
20 OVERCROWDING IS CREATING INCREASED VIOLENCE, STRESS, MENTAL
21 ILLNESS. IT'S INCREASING THE DEMAND FOR MEDICAL SERVICES,
22 MENTAL HEALTH SERVICES. IT'S GENERATING DISEASE. IT MUST BE
23 REDUCED. AND THAT'S THE ONLY WAY WE CAN SOLVE THESE PROBLEMS.

24 WHEN WE TALK ABOUT THIS NUMBER OF 130 PERCENT, WHERE
25 IS THE EVIDENCE IN THE RECORD THAT THERE IS SOME OTHER NUMBER?

1 WHERE IS DEFENDANT SHOWING OF SOME NARROWER RELIEF? WHERE IS
2 THEIR SHOWING THAT THESE PROBLEMS CAN BE SOLVED IN ANY OTHER
3 WAY?

4 ON THE MENTAL HEALTH SIDE WE HAVE ROBIN DEZEMBER --

5 **JUDGE REINHARDT:** WELL, DIDN'T THE INDEPENDENT REVIEW
6 PANEL RECOMMEND 145 PERCENT?

7 **MR. BIEN:** THEY DID. AND THE EVIDENCE THAT WE
8 INTRODUCED IS THAT FROM -- BY CHANCE, ROBIN DEZEMBER HAD A
9 DIFFERENT HAT THEN. HE WAS CHAIR OF THAT -- HE WAS THEIR CHAIR
10 OF THAT EXECUTIVE STAFF. I FORGOT HIS TITLE. AND HE TESTIFIED
11 AT HIS DEPOSITION, WHICH IS IN EVIDENCE, THAT THAT GROUP WAS A
12 GROUP OF WARDENS AND THAT THEY DID NOT TAKE INTO ACCOUNT THE
13 DELIVERY OF MEDICAL AND MENTAL HEALTHCARE IN THEIR ANALYSIS.
14 THAT WAS NOT SOMETHING THAT WAS BEFORE THEM.

15 AND WE INTRODUCED -- THE LOWER NUMBER COMES FROM
16 CONSIDERATION OF THOSE FACTORS AND, IN ADDITION, FROM
17 CONSIDERATION OF THE MORE RECENT ANALYSIS BY THE DEPARTMENT OF
18 ITS OWN CAPACITY BY -- BY DEBRA HYSEN AND OTHERS WHO WERE
19 RESPONSIBLE FOR PLANNING THE IN-FILL BEDS AND OTHER PROGRAMS.
20 THEY KNOW WHAT TO DO. THEY KNOW --

21 **JUDGE KARLTON:** NO. I MEAN, THE TRUTH OF THE MATTER
22 IS THAT WE ARE HERE BECAUSE THERE IS OVERWHELMING EVIDENCE THAT
23 THEY DON'T KNOW WHAT TO DO OR HOW TO DO IT. I MEAN, THAT'S
24 WHERE WE ARE. IF I WERE TO RELY UPON THE DEPARTMENT, WE COULD
25 ALL GO HOME.

1 **MR. BIEN:** WE ARE ASKING YOU TO DO A DIFFICULT THING,
2 JUDGE KARLTON.

3 I THINK FOR ALL OF US WHO HAVE LIVED THROUGH BROKEN
4 PROMISES AND DESTROYED PLANS AND IN THE MIDDLE OF THIS TRIAL
5 HAVE A DEFENSE BASED ON THE -- WE ARE GOING TO THROW ALL THE
6 MENTAL HEALTH PROBLEMS INTO THE RECEIVER'S HANDS AND THEN BE
7 TOLD THAT WE'VE CHANGED OUR MIND, OF COURSE, OUR FAITH IN THIS
8 SYSTEM IS BROKEN. AND I UNDERSTAND THAT YOURS IS AND THAT MINE
9 IS, TOO.

10 BUT WE ARE ASKING YOU, AND OUR POSITION IS THAT WE
11 MUST RECORD ALL THAT INFORMATION, MAKE THE FINDINGS ABOUT WHAT
12 WE HAVE LEARNED ABOUT WHAT'S GOING ON IN THE PRISONS, THE
13 APPROPRIATE CAPACITY, THE EFFECTS OF OVERCROWDING, MAKE THE
14 APPROPRIATE FINDINGS ABOUT PUBLIC SAFETY, MAKE THE APPROPRIATE
15 FINDINGS ABOUT WHAT WE HAVE LEARNED ABOUT THE BROKEN
16 RELATIONSHIP BETWEEN OUR STATE AND COUNTY GOVERNMENTS, THE
17 BROKEN RELATIONSHIP BETWEEN D.A.'S AND THE DEPARTMENT OF
18 CORRECTIONS AND PAROLE.

19 I MEAN, WE CAN'T SOLVE ALL THOSE PROBLEMS. YOU DON'T
20 HAVE THE POWER TO SOLVE ALL THOSE PROBLEMS.

21 AND THESE ARE PROBLEMS THAT, APPARENTLY, OUR PUBLIC
22 OFFICIALS ARE WELL AWARE OF. THEY HAVE TESTIFIED ABOUT THEM,
23 ARE PERFECTLY FINE TO LIVE WITH DESPITE THE RISK TO PUBLIC
24 SAFETY, DESPITE BUDGET CRISIS.

25 WE CAN'T SOLVE THEM. YOU DON'T HAVE THE POWER TO

1 SOLVE THEM.

2 HOWEVER, THERE'S SOMETHING THAT WE CAN DO, AND WE ARE
3 ASKING YOU TO DO, THAT CAN MOVE THE STATE OF CALIFORNIA FORWARD
4 AND, HOPEFULLY, HELP EVERYONE.

5 ONE IS, MAKE THE FINDINGS ABOUT WHAT WAS TRIED IN
6 THIS CASE. THIS CASE WAS AN INVALUABLE LESSON FOR ALL OF US ON
7 THE DYSFUNCTION OF THE STATE OF CALIFORNIA AT THIS VERY MOMENT.
8 AND THE EVIDENCE WAS UNDISPUTED THAT OUR LEADERSHIP IS UNABLE
9 TO MAKE DECISIONS ABOUT THE FUNDAMENTAL THINGS THAT GOVERN THE
10 RELATIONSHIP BETWEEN COUNTIES AND THE STATE, ABOUT HEALTHCARE
11 IN THE COUNTIES, ABOUT WHO IS RESPONSIBLE FOR PROVIDING THINGS.
12 THAT'S TRUE.

13 ON THE OTHER HAND, THE SUPREME COURT HAS MADE CLEAR
14 THAT OUR PUBLIC OFFICIALS MUST BE GIVEN THE OPPORTUNITY TO STEP
15 FORWARD AND TO ADDRESS THIS PROBLEM.

16 ONCE YOU MAKE THE FINDINGS, WE URGE YOU TO ALLOW THE
17 STATE TO COME UP WITH THEIR PLAN IN CONSULTATION WITH THE
18 INTERVENORS, PLAINTIFFS' COUNSEL. AND I CAN TELL YOU THAT THEY
19 HAVE BEEN DOING THIS PLAN. THEY HAVE A PLAN. THE GOVERNOR
20 WENT FORWARD IN THE BUDGET. HE'S DONE IT FIVE TIMES SINCE
21 2006. THEY HAVE A PLAN TO DO EXACTLY WHAT WE ARE TALKING
22 ABOUT.

23 MR. AUSTIN --

24 **JUDGE REINHARDT:** YOU SAY THE GOVERNOR'S BUDGET
25 CONTAINS THE PLAN THAT WOULD SOLVE YOUR PROBLEM?

1 **MR. BIEN:** THE GOVERNOR'S BUDGET AND THE DEPARTMENT
2 OF CORRECTIONS HAS ANALYZED EACH OF THE VERY MEASURES THAT WE
3 HAVE PUT FORWARD AS PROPOSALS. THEY HAVE LOOKED AT CHANGES IN
4 PAROLE, WHICH THEY ARE IMPLEMENTING. SOME OF THEM THEY ARE NOT
5 IMPLEMENTING, BUT THEY HAVE STUDIED THEM ALL.

6 THEY HAVE LOOKED AT CHANGES IN CREDITS. THEY HAVE
7 LOOKED AT CHANGES IN SENTENCING AND CHANGING THE DEFINITIONS OF
8 VARIOUS CRIMES TO AFFECT WHO IS IN PRISON.

9 **JUDGE KARLTON:** LET'S TALK ABOUT THAT FOR A MOMENT.
10 IT'S SO FAR DOWN THE LINE, MAYBE WE SHOULDN'T BE TALKING ABOUT
11 IT, BUT IT APPEARS CLEAR THAT UNDER THE PLRA UNDER APPROPRIATE
12 CIRCUMSTANCES THE COURT CAN ORDER A WAIVER OF STATE LAW.

13 DOES THAT INCLUDE, IN YOUR VIEW, REDEFINING THE LEVEL
14 OF CRIME? USING THE EXAMPLE THAT'S BEEN TALKED ABOUT IN THE
15 TRIAL, ABOUT RAISING THE AMOUNT BEFORE IT BECOMES -- OF A THEFT
16 BEFORE IT BECOMES A FELONY? DO WE HAVE THE POWER TO DO THAT
17 YOU THINK?

18 **MR. BIEN:** AT THIS STAGE I DO NOT THINK YOU DO.

19 **JUDGE REINHARDT:** WE ARE TALKING ABOUT WAY DOWN THE
20 LINE. ASSUMING THAT THERE IS A CAP, ASSUMING THE STATE SAYS,
21 WE ARE NOT INTERESTED IN DEVELOPING OUR OWN PLAN.

22 **MR. BIEN:** I THINK THAT THE POWER OF THIS COURT WOULD
23 BE, AT THE LEAST, IN AREAS SUCH AS, YOU KNOW, REDEFINING A
24 CRIME.

25 YOU KNOW, THE MODELS THAT WE HAVE SEEN IN TERMS OF

1 CAPS IS REALLY THE MODEL THAT WE ARE SUGGESTING, WHICH IS THE
2 COURT SAYS YOU CANNOT OPERATE YOUR PRISONS AT THIS CAPACITY.
3 PEOPLE ARE DYING. IT'S UNSAFE. IT'S BAD FOR PUBLIC SAFETY.

4 **JUDGE REINHARDT:** LET'S GET TO THE POINT. YOU ARE UP
5 TO THE POINT IN JUDGE KARLTON'S QUESTION WHERE THERE IS A CAP.
6 THE STATE HASN'T COME UP WITH A PLAN. THE GOVERNOR HAS
7 SUGGESTED A PLAN.

8 DOES THE COURT HAVE THE AUTHORITY --

9 **JUDGE KARLTON:** BUT THE LEGISLATURE HAS DONE NOTHING.

10 **JUDGE REINHARDT:** DOES THE COURT HAVE THE AUTHORITY
11 TO ORDER THE GOVERNOR'S PLAN INTO EFFECT?

12 **MR. BIEN:** I THINK IT DOES. I THINK AT THAT POINT
13 WHEN, IF THE STATE OF CALIFORNIA IS COMING FORWARD. I MEAN,
14 APPARENTLY, THAT'S THE ONLY WAY THEY OPERATE THESE DAYS.

15 AS JUDGE KARLTON AND JUDGE HENDERSON WILL TELL YOU,
16 JUDGE REINHARDT, THEY WANT TO DO SOMETHING VOLUNTARILY, THEY
17 COME TO THE COURT AND SAY, "PLEASE ORDER ME TO DO THIS." I
18 JUST DON'T KNOW WHY, BUT THAT'S WHAT THEY DO.

19 SO, APPARENTLY, THE STATE THINKS THAT THAT'S HOW
20 THINGS SHOULD OPERATE. THEY CAN'T DO ANYTHING ON THEIR OWN.

21 **JUDGE REINHARDT:** THE QUESTION IS: IS THE AUTHORITY
22 -- ASSUME FROM YOUR VIEW OF LIFE --

23 **MR. BIEN:** I THINK IF THE GOVERNOR OF THE STATE OF
24 CALIFORNIA AND THE HEAD OF THE DEPARTMENT OF CORRECTIONS COMES
25 AND SAYS, IN ORDER TO COMPLY WITH THIS ORDER TO ESTABLISH

1 CONSTITUTIONAL MEDICAL MENTAL HEALTHCARE IN THESE PRISONS AND
2 TO ACHIEVE THE POPULATION LEVEL THAT YOU HAVE REQUESTED, THAT I
3 REQUEST AN ORDER WAIVING STATE LAW "X," I THINK THAT YOU HAVE
4 THE AUTHORITY TO DO THAT. UNDER THE PLRA IT SAYS YOU DO
5 EXPRESSLY.

6 BUT I THINK THAT THE -- AND THAT, UNFORTUNATELY, MAY
7 BE SOMETHING THAT HAPPENS.

8 **JUDGE REINHARDT:** THAT'S WAY DOWN THE LINE.

9 **MR. BIEN:** HOPEFULLY, NOT TOO FAR DOWN THE LINE. I
10 THINK THAT, YOU KNOW --

11 **JUDGE KARLTON:** I DON'T THINK YOU UNDERSTAND HOW
12 RELUCTANT WE ARE -- NEVER MIND. GO AHEAD.

13 **MR. BIEN:** WELL --

14 **JUDGE REINHARDT:** WELL, SOME MORE THAN OTHERS.

15 **MR. BIEN:** YOU KNOW, I THINK THAT -- I DO UNDERSTAND
16 HOW RELUCTANT YOU ARE AND YOU HAVE TO UNDERSTAND HOW RELUCTANT
17 I AM, TOO.

18 I WOULD LIKE TO GET -- WE HAVE CLIENTS, AS WE SIT
19 HERE IN THIS -- AS JUDGE REINHARDT SAID, IN ONE OF THE MOST
20 BEAUTIFUL COURTROOMS IN THE WORLD, IF NOT THE COUNTRY HERE, I
21 HAVE CLIENTS WHO ARE GOING TO DIE IN THE NEXT COUPLE OF DAYS --

22 **JUDGE REINHARDT:** WHEN I SAID WE HAVE A LOT, I WASN'T
23 TALKING ABOUT TIME. I WAS TALKING ABOUT PROCESS. WE TALKED
24 ABOUT IF YOU WERE TO PREVAIL ON SOME OF THE ISSUES, THE FIRST
25 STEP WOULD BE PROBABLY THE ISSUE OF CAPPING. I HAVE TO TELL

1 THE STATE TO COME UP WITH A PLAN.

2 WHEN I SAID DOWN THE LINE, I'M TALKING ABOUT AT THAT
3 POINT WE WOULD CONSIDER SOME OF THE ISSUES THAT WE ARE NOW
4 DISCUSSING IN THEORY NOW BECAUSE THEY MIGHT NEVER ARISE.

5 SO I DON'T MEAN IT'S GOING TO TAKE A YEAR, SIX
6 MONTHS, WHATEVER. IT'S AT THE NEXT STAGE OF THE PROCEEDINGS
7 SHOULD WE REACH IT.

8 **MR. BIEN:** THAT'S CORRECT, YOUR HONOR, AND WE THINK
9 IT WOULD BE PREMATURE TO REACH THAT QUESTION NOW.

10 **JUDGE REINHARDT:** ALL RIGHT. NOW, WHAT'S YOUR NEXT
11 SUBJECT?

12 **MR. BIEN:** I THINK IN TERMS OF PRIMARY CAUSE AND AS
13 TO THE MENTALLY ILL, WE HAVE COVERED IT.

14 I WILL SAY THAT IN TERMS OF WHAT YOU WILL HEAR, I
15 ASSUME, FROM THE DEFENDANTS IS THAT SOMEHOW -- THERE'S JUST TWO
16 THINGS I WOULD LIKE TO ADDRESS.

17 ONE IS THAT SOMEHOW THE COLEMAN CLASS IS NOT AFFECTED
18 BY OVERCROWDING. I THINK THAT WE HAVE MADE THE CASE THAT THE
19 COLEMAN CLASS IS AFFECTED IN EVERY WAY AND EVERY DAY BY
20 OVERCROWDING; NOT JUST THE 5,000 THAT DEFENDANTS ADMIT ARE IN
21 THESE BAD BEDS, BUT THE COLEMAN CLASS MEMBERS WHO ARE HOUSED
22 THROUGHOUT THE PRISONS.

23 AND I THINK THAT ONE THING THAT'S IMPORTANT TO
24 REMEMBER HERE IS THAT BOTH THE COLEMAN AND PLATA CLASSES ARE
25 FLUID CLASSES. EVERY DAY THEIR MEMBERSHIP CHANGES.

1 ANYONE MAY NEED MEDICAL OR MENTAL HEALTHCARE AT A
2 PARTICULAR MOMENT, BUT ONE THING THAT I THINK WE DIDN'T
3 EMPHASIZE THAT I WOULD LIKE TO BRING TO YOUR ATTENTION IS THAT
4 ONE HALF OF THE SUICIDES THAT OCCUR ARE OF NON, QUOTE, COLEMAN
5 CLASS MEMBERS. IN OTHER WORDS, AT THE TIME THAT THEY WERE --
6 THEY KILLED THEMSELVES, THEY HAD NOT BEEN IDENTIFIED.

7 THE SUICIDE PREVENTION MEASURES THAT ARE MANDATED BY
8 COLEMAN APPLY TO EVERYONE. THEY APPLY TO ALL PEOPLE IN THE
9 PRISONS.

10 THE MEDICAL PROVISIONS APPLY TO EVERYONE. THE
11 SCREENING PROVISIONS FOR MEDICAL AND MENTAL HEALTHCARE APPLY TO
12 EVERYONE.

13 THE IDEA THAT SOMEHOW WE CAN PICK OUT THE COLEMAN
14 CLASS OR THE PLATA CLASS AND JUST DO A REMEDY FOR THEM IS A
15 FICTION. THERE IS NO SUCH GROUP. IF YOU LEFT THE PRISONS
16 OVERCROWDED AND REMOVED THE MOST SERIOUSLY ILL, FOR EXAMPLE, OF
17 THE COLEMAN AND PLATA CLASSES, THAT WOULD NOT SOLVE THE
18 PROBLEMS OF OVERCROWDING BECAUSE IF YOU STILL LEFT THAT
19 CROWDING, YOU LEFT THOSE HORRIBLE RECEPTION CENTERS, YOU LEFT
20 THE CHURNING OF PAROLE VIOLATORS THROUGH, THE SAME PATHOGENIC
21 SITUATION WOULD REMAIN. THE SAME CRIMINOGENIC SITUATIONS WOULD
22 REMAIN. THE SAME PROBLEMS WOULD REMAIN.

23 THE REMEDY MUST BE BROAD. IN OTHER WORDS, IT HAS TO
24 BE A NARROWLY TAILORED REMEDY, BUT IT WILL NOT WORK -- THE
25 EVIDENCE SHOWS IT WILL NOT WORK UNLESS THERE IS A GENERAL

1 REDUCTION IN THE POPULATION.

2 JUDGE KARLTON ASKED, YOU KNOW, IS IT GOING TO HELP
3 THE COLEMAN CLASS TO HAVE THIS GENERAL REDUCTION? WE PROVED
4 THROUGH MR. AUSTIN AND THROUGH VARIOUS OTHER MEANS THAT IT WILL
5 HELP. THE WAIT LIST WILL GO WAY, WAY DOWN. IF 8,000 OR 9,000
6 COLEMAN CLASS MEMBERS -- IF THE REDUCTION IS FIFTY, FOR
7 EXAMPLE, OVER TWO YEARS, APPROXIMATELY, 8,000 OR 9,000 COLEMAN
8 CLASS MEMBERS WILL BE REMOVED FROM THE PRISONS. THAT WILL HAVE
9 A TREMENDOUS EFFECT, IF YOU LOOK AT THE STATISTICS, ON THE
10 ABILITY TO DELIVER CARE. WILL IT SOLVE ALL THE PROBLEMS? NO.

11 AND I THINK THAT'S THE OTHER DEFENSE YOU ARE GOING TO
12 HEAR. YOU KNOW, NOT ONE EXPERT FOR THE PLAINTIFF SAID THAT IF
13 YOU DO THE POPULATION REDUCTION, IT WILL BE CONSTITUTIONAL. OF
14 COURSE NOT. WE ARE GOING TO NEED -- UNFORTUNATELY, WE ARE
15 GOING TO STILL NEED SOME CONSTRUCTION OF SOME BEDS. WE ARE
16 STILL GOING TO NEED CLINICIANS TO BE HIRED.

17 THERE'S STILL GOING TO BE CHALLENGES, AS MR. KEATING
18 POINTED OUT, BECAUSE WHEN YOU BUILD A PRISON IN THE MIDDLE OF
19 NOWHERE, PEOPLE TEND NOT TO LIKE TO WORK THERE.

20 ALL THOSE CHALLENGES ARE GOING TO PERSIST. BUT IT
21 DOESN'T MEAN THAT WE SHOULDN'T DO THIS POPULATION REDUCTION.
22 WITHOUT THE POPULATION REDUCTION, WE WILL NEVER END THESE
23 CASES.

24 **JUDGE REINHARDT:** YOU MEAN THAT WE CANNOT ORDER A
25 REMEDY THAT WILL SOLVE THE CONSTITUTIONAL PROBLEM?

1 **MR. BIEN:** THIS REMEDY WILL BE A STEP. WITHOUT THIS
2 REMEDY, THE CONSTITUTIONAL PROBLEMS WILL PERSIST.

3 **JUDGE REINHARDT:** AND WITH THE REMEDY, THE
4 CONSTITUTIONAL PROBLEMS WILL PERSIST ALSO.

5 **MR. BIEN:** NO. I THINK THAT WE'LL BE ON A -- THEY
6 WILL PERSIST UNTIL THE REMEDY IS IMPLEMENTED AND UNTIL THE REST
7 OF THE ORDERS ARE COMPLIED WITH.

8 BUT THE EVIDENCE IS UNDISPUTED -- DR. PACKER AGREES
9 WITH THIS, EVEN MR. DEZEMBER AGREES WITH THIS -- THAT YOU HAVE
10 TO BRING THE POPULATION DOWN, THAT THERE WILL BE AN IMMEDIATE
11 BENEFIT.

12 ARE WE GOING TO SOLVE EACH AND EVERY PROBLEM THROUGH
13 THIS POPULATION REDUCTION? NO. AND I THINK THAT THAT IS --
14 THERE HASN'T BEEN ONE PLAN IN ANY OF THESE CASES THAT ANYONE
15 EVER THOUGHT WAS GOING TO SOLVE EACH AND EVERY PART OF THE
16 PROBLEM.

17 **JUDGE KARLTON:** THE ANSWER -- NOT THE ANSWER. THE
18 STATE OF THE EVIDENCE, AS I UNDERSTAND IT, MR. BIEN, TELL ME,
19 IS THAT YOU CAN'T SOLVE THE PROBLEM WITHOUT SOLVING THE
20 OVERCROWDING, BUT OVERCROWDING IN AND OF ITSELF WILL NOT SOLVE
21 THE PROBLEM.

22 **JUDGE REINHARDT:** THAT'S WHAT I UNDERSTAND YOU TO BE
23 SAYING.

24 **MR. BIEN:** THAT'S CORRECT.

25 **JUDGE REINHARDT:** BUT WHAT I'M ASKING YOU IS, ISN'T

1 THE COURT'S OBLIGATION TO GO BEYOND THAT AND SOLVE THE
2 CONSTITUTIONAL PROBLEMS?

3 **MR. BIEN:** I THINK SO. BUT THE THREE-JUDGE COURT, I
4 THINK, MUST ADDRESS THE OVERCROWDING, AND THEN THE --

5 **JUDGE KARLTON:** GOES BACK TO US.

6 **MR. BIEN:** AND THEN JUDGE KARLTON AND JUDGE HENDERSON
7 WILL --

8 **THE COURT:** THAT'S WHAT I'M ASKING YOU. WHERE DO YOU
9 GET THE IDEA THAT THAT THIS THREE-JUDGE COURT SHOULDN'T RESOLVE
10 THE CONSTITUTIONAL PROBLEM IN ITS ENTIRETY?

11 **JUDGE KARLTON:** BECAUSE THE STATUTE DEALS WITH
12 OVERCROWDING.

13 **MR. BIEN:** AS MUCH AS I AGREE THAT WE ARE NOT ASKING
14 THE THREE-JUDGE COURT TO REMAIN FOREVER, I THINK THAT TO THE
15 EXTENT THE THREE-JUDGE COURT'S ORDERS -- WE THINK THERE NEEDS
16 TO BE A CAP, NOT JUST A REDUCTION.

17 **JUDGE REINHARDT:** WHEN YOU ARE TALKING ABOUT THE --
18 THAT THAT WILL SOLVE THE OVERCROWDING PROBLEM, BUT WILL LEAVE
19 THE CONSTITUTIONAL PROBLEM --

20 **MR. BIEN:** WELL --

21 **JUDGE REINHARDT:** -- PARTLY SOLVE, NOT ENTIRELY
22 SOLVE. THERE ARE OTHER THINGS YOU THINK ARE NECESSARY TO SOLVE
23 THE CONSTITUTIONAL PROBLEM.

24 WHAT I'M ASKING YOU IS: DO YOU READ THE STATUTE AS
25 SAYING THAT THE THREE-JUDGE COURT'S AUTHORITY STOPS WHEN IT

1 REDUCES THE OVERCROWDING PROBLEM AND LEAVES THE CONSTITUTIONAL
2 PROBLEM STILL EXISTING?

3 **MR. BIEN:** YOU ARE GOING A LITTLE DOWN THE ROAD. I
4 THINK THAT THE -- TO ME, I GUESS I'D SAY YES.

5 **JUDGE REINHARDT:** NO, I'M NOT GOING DOWN THE ROAD.

6 **MR. BIEN:** I GUESS I WOULD SAY YES.

7 **JUDGE REINHARDT:** YOU SAID THE RELIEF YOU ARE ASKING
8 FOR IS TO RESOLVE THE OVERCROWDING PROBLEM AND THAT THAT WILL
9 LEAVE MORE PROBLEMS THAT PREVENT -- THAT RESULT IN THE
10 CONSTITUTIONAL PROBLEM CONTINUING.

11 AND I ASKED: UNDER THE PLRA, WHAT IS THE OBLIGATION
12 OF THE THREE-JUDGE COURT? IS IT ONLY TO SOLVE OVERCROWDING OR
13 IS IT TO RESOLVE THE CONSTITUTIONAL PROBLEM?

14 **MR. BIEN:** WELL, THE REMEDY IS NOT ADDRESSED MERELY
15 AT OVERCROWDING. OVERCROWDING IS THE PRIMARY CAUSE OF THE
16 CONSTITUTIONAL PROBLEMS.

17 SO TO THE EXTENT THAT OVERCROWDING NEEDS TO BE
18 ADDRESSED, THE THREE-JUDGE COURT HAS SPECIAL POWER TO DO THAT.

19 **JUDGE REINHARDT:** RIGHT. THAT I UNDERSTAND. WE ARE
20 ALL IN AGREEMENT THAT WE CAN RESOLVE THE OVERCROWDING PROBLEM.
21 ASSUMING THERE'S AN OVERCROWDING PROBLEM, THE THREE-JUDGE COURT
22 HAS THE AUTHORITY TO RESOLVE THAT.

23 NOW, WHAT I'M ASKING YOU IS: IS THE THREE-JUDGE
24 COURT LIMITED TO RESOLVING OVERCROWDING AND LEAVING THE
25 CONSTITUTIONAL VIOLATION IN EFFECT? OR IS THE THREE-JUDGE

1 COURT'S OBLIGATION TO RESOLVE THE OVERCROWDING AND MAKE -- AND
2 CURE THE CONSTITUTIONAL PROBLEM?

3 **JUDGE HENDERSON:** LET ME BE A LITTLE MORE SPECIFIC,
4 IF I CAN, STEVE.

5 **JUDGE REINHARDT:** SURE.

6 **JUDGE HENDERSON:** FOR EXAMPLE, YOU SAID WE ARE STILL
7 GOING TO NEED CONSTRUCTION. CAN THE THREE-JUDGE COURT DEAL
8 WITH THAT PROBLEM? WE ARE GOING TO NEED -- THAT'S A STATE
9 CONSTITUTIONAL PROBLEM. CAN THE THREE-JUDGE COURT ORDER THE
10 CONSTRUCTION AS A PART OF THE REMEDY?

11 **JUDGE REINHARDT:** I JUST WANT TO KNOW WHAT WE ARE
12 SUPPOSED TO DO.

13 **MR. BIEN:** I THINK AGAIN -- NOW WE ARE TALKING ABOUT
14 DOWN THE ROAD. I'M GOING TO PUT ASIDE THE QUESTION THAT IS NOW
15 BEFORE THE NINTH CIRCUIT, WHICH IS WHETHER THE APPEAL ALREADY
16 PERMITS ANY COURT TO ORDER CONSTRUCTION OF ANYTHING.
17 APPARENTLY, THE --

18 **JUDGE REINHARDT:** WELL, THE PLRA SAYS THAT WE CAN
19 ORDER THIS. SO LEAVE THAT ONE ASIDE. IT SAYS:

20 "WHILE NOTHING IN THIS SECTION SHALL BE CONSTRUED
21 TO AUTHORIZE THE COURTS IN EXERCISING THEIR REMEDIAL
22 POWERS TO ORDER THE CONSTRUCTION OF PRISONS."

23 WHATEVER THAT MEANS, THAT'S PART OF WHAT WE ARE DOING
24 I THINK. WHETHER SOMEONE ELSE CAN, SOME OTHER COURT CAN, BUT
25 AS FAR AS OUR THREE-JUDGE COURT, I'M ASSUMING THAT WE CAN'T DO

1 THAT; BUT, AS YOU SAID, WHETHER SOME OTHER AUTHORITY CAN DO IT
2 MAY BE PART OF AN ISSUE BEFORE THE NINTH CIRCUIT OR WHATEVER.

3 SO LET'S LEAVE ASIDE CONSTRUCTION. THERE ARE OTHER
4 THINGS YOU SAY MAY BE NECESSARY.

5 **MR. BIEN:** I THINK THAT TO THE EXTENT THAT YOU HAVE
6 THE PRISONER RELEASE ORDER LANGUAGE, WHICH IS SO BROAD, THAT IF
7 WE COME DOWN THE ROAD AND THERE IS SOMETHING THAT NEEDS TO BE
8 DONE THAT'S A PRISONER RELEASE ORDER, THEN THE DISTRICT JUDGES
9 BY THEMSELVES WILL NOT BE ABLE TO DO THAT.

10 **JUDGE REINHARDT:** YOU KNOW, I'M ONLY ASKING THIS
11 QUESTION BECAUSE YOU RAISED IT. YOU SAID TO US, YOU GIVE US
12 THIS PRISONER RELEASE ORDER AND IT WILL NOT SOLVE THE
13 CONSTITUTIONAL PROBLEM. I DIDN'T SAY IT. YOU SAID IT.

14 AND THAT LEAVES TWO THINGS THAT HAVE TO BE DONE IN
15 ORDER TO RESOLVE THE CONSTITUTIONAL PROBLEM.

16 **MR. BIEN:** WHAT I MEANT TO SAY, YOUR HONOR, IS THE
17 POPULATION REDUCTION IS A NECESSARY, BUT NOT SUFFICIENT REMEDY
18 FOR ALL THE VIOLATIONS.

19 **JUDGE REINHARDT:** ABSOLUTELY. THAT'S WHAT YOU SAID.

20 **JUDGE KARLTON:** SEVERAL TIMES.

21 **JUDGE REINHARDT:** IT IS NOT A SUFFICIENT REMEDY TO
22 SOLVE THE CONSTITUTIONAL PROBLEM. AND I SAID, WHY SHOULDN'T WE
23 THEN SOLVE THE CONSTITUTIONAL PROBLEM? IS THAT OUR OBLIGATION?
24 IS THAT OUR AUTHORITY?

25 **MR. BIEN:** TO THE EXTENT THE PRISONER RELEASE ORDER

1 IS NECESSARY TO SOLVE THE CONSTITUTIONAL VIOLATIONS, I THINK IT
2 WOULD BE --

3 **JUDGE REINHARDT:** THAT'S NOT THE QUESTION. THE
4 QUESTION IS: WE ALL ASSUME THAT WE ARE HERE TO ISSUE A
5 PRISONER RELEASE ORDER, WHICH YOU TELL US DOES NOT RESULT IN A
6 CONSTITUTIONAL PROBLEM.

7 SO I SAID, ONCE WE ARE HERE, ASSUMING WE ARE GOING TO
8 ISSUE A PRISONER RELEASE ORDER AND IT DOESN'T SOLVE THE
9 CONSTITUTIONAL PROBLEM, UNDER THE PLRA IS IT OUR OBLIGATION OR
10 DO WE HAVE THE AUTHORITY TO GO AHEAD AND SOLVE THE
11 CONSTITUTIONAL PROBLEM?

12 **MR. BIEN:** I WOULD HAVE TO SAY THAT IT'S SO -- THAT
13 THE ANSWER IS NO; THAT FIRST YOU NEED TO ALLOW THE REMEDIES TO
14 PROCEED IN THE DISTRICT COURT, TWO SEPARATE DISTRICT COURTS.
15 THAT THESE DISTRICT COURTS HAVE THE POWER. THEY HAVE THE --
16 THEY HAVE THE ABILITY TO SOLVE THESE PROBLEMS.

17 BUT FOR OVERCROWDING, THESE CASES, IN OUR OPINION,
18 WOULD BE RESOLVED, AND THE -- THE OVERCROWDING IS THE REASON
19 THAT WE ARE A DOZEN YEARS DOWN IN COLEMAN AND IT'S OUR
20 CONTENTION THAT ONCE OVERCROWDING IS RESOLVED AND BROUGHT UNDER
21 CONTROL, THAT THE SEPARATE REMEDIES WILL BE ABLE TO SOLVE THE
22 PROBLEM.

23 **JUDGE REINHARDT:** OKAY. DO YOU HAVE ANYTHING ELSE?

24 **MR. BIEN:** I THINK -- I THINK THAT WHEN WE FOCUS
25 ON -- I GUESS I THINK THAT THE REMEDY THAT WE ARE SUGGESTING

1 WILL ADDRESS THE PROBLEMS AND I THINK THAT -- THAT IT IS -- WE
2 ARE AT SUCH AN EXTREME LEVEL, UNPRECEDENTED LEVEL OF
3 OVERCROWDING, THAT THE PICTURES YOU SAW, THE VIDEOS YOU SAW
4 REALLY ONLY GIVE A TOUCH FOR HOW HORRIFIC THE CONDITIONS ARE.

5 THESE CONDITIONS MUST BE RESOLVED AND THEY MUST BE
6 RESOLVED PROMPTLY. IT CAN BE RESOLVED SAFELY. IT CAN BE
7 RESOLVED IN A WAY THAT WILL BOTH BENEFIT THE CITIZENS OF
8 CALIFORNIA AND IMPROVE PUBLIC SAFETY. IT CAN BE RESOLVED IN A
9 MANNER THAT WILL ACTUALLY SAVE MONEY. THIS IS THE FIRST REMEDY
10 THAT WE HAVE EVER ADVOCATED THAT ACTUALLY WILL COST -- SAVE
11 MONEY TO THE STATE IN THE MIDST OF A FINANCIAL CRISIS.

12 STATES ALL ACROSS THE COUNTRY ARE DOING EXACTLY WHAT
13 WE ARE SAYING RIGHT NOW AS A MATTER OF FISCAL WISDOM. IT
14 DOESN'T -- WHAT WE ARE DOING IN CALIFORNIA JUST DOESN'T WORK.
15 IT DOESN'T WORK FOR PUBLIC SAFETY. IT DOESN'T WORK FOR OUR
16 BUDGET. IT DOESN'T WORK FOR THE PRISONERS, WHICH IS THE REASON
17 WE ARE HERE. THEY ARE SUFFERING AND DYING AS A RESULT OF
18 FAILED PUBLIC POLICY. WE NEED TO MOVE FORWARD.

19 AND I REALLY HAVE NOTHING ELSE. THANK YOU.

20 **JUDGE REINHARDT:** ALL RIGHT. THANK YOU VERY MUCH. I
21 GUESS THERE IS NOTHING FURTHER FROM THE PLAINTIFFS AT THIS
22 POINT. WE WILL --

23 **JUDGE HENDERSON:** THE CCPOA.

24 **JUDGE REINHARDT:** ALL RIGHT. SO WE WILL HEAR FROM
25 THE INTERVENORS AFTER LUNCH, AND THEN WE WILL HEAR FROM THE

1 DEFENDANTS AND DEFENDANT INTERVENORS.

2 ALL RIGHT. THE COURT WILL TAKE AN HOUR'S RECESS.

3 (WHEREUPON AT 12:12 P.M. PROCEEDINGS

4 WERE ADJOURNED FOR NOON RECESS.)

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PROCEEDINGS

FEBRUARY 23, 2009

1:15 P.M.

(WHEREUPON, PROCEEDINGS WERE RESUMED
AFTER NOON RECESS.)

JUDGE HENDERSON: CCPOA.

THE COURT: YES, YOUR HONOR.

JUDGE REINHARDT: WHICH SIDE ARE YOU ON TODAY?

MS. LEONARD: THE SIDE WHERE WE HAVE ALWAYS BEEN.

IF YOU CAN'T HEAR ME, LET ME KNOW. IN MY CASE, AT MY
TOWERING HEIGHT, I HAVE A MICROPHONE RIGHT OVER MY HEAD.

CLOSING ARGUMENT

MS. LEONARD: SO FIRST OF ALL, MAY IT PLEASE THE
COURT, WE WOULD LIKE TO THANK YOU FOR ALLOWING US TO INTERVENE
IN THIS PROCEEDING AND TO GIVE THE VIEWS THAT WE CAN OF BEING
INSIDE THE PRISONS EVERY DAY.

I'M PLEASED TO KNOW THAT MOST OF WHAT I WAS GOING TO
SAY WAS COVERED BY THE PLAINTIFFS AND I THINK ALREADY WELL
UNDERSTOOD BY THIS COURT.

WE INTERVENED PRIMARILY TO TALK ABOUT THE CONDITIONS.
AND THIS IS A CASE WHERE WE KNOW THE SIDE THAT WE ARE ON, AND
WE ARE ON THE RIGHT SIDE. WE TRIED EVERYTHING THAT WE CAN TO
DEAL WITH OVERCROWDING IN EVERY SITUATION POSSIBLE, TO NO
AVAIL.

IT'S BEEN VERY CONFUSING AND WE'VE EFFECTUALLY BEGUN

1 TO TALK ABOUT A CALDRON OF CONTRADICTION IN WHICH THE STATE
2 MAKES ITS DECISIONS.

3 MR. SPECTER VERY CLEARLY COVERED THE CASE OF THE
4 RECEIVER. THE RECEIVER HAS BEEN THE PANACEA IN THIS CASE, YET
5 THERE IS A PENDING MOTION TO DISSOLVE THE RECEIVERSHIP WE ARE
6 TRYING TO CREATE. FOR TRYING, FOR EXAMPLE, TO CREATE --

7 **JUDGE REINHARDT:** DO YOU MEAN THE ACTUAL PANACEA OR
8 THE STATE HAS SAID HE IS A PANACEA?

9 **MS. LEONARD:** THE STATE HAS SAID HE IS A PANACEA, BUT
10 HE ALSO HAS BIG PLANS. SIMILARLY, THIS MORNING JUDGE KARLTON
11 MENTIONED THE CCPOA VERSUS SCHWARZENEGGER, A CASE IN WHICH WE
12 HAD SOME INVOLVEMENT.

13 AND I'M GOING TO DO SOMETHING I'VE NEVER DONE BEFORE.
14 I HAVEN'T BROUGHT THE BLACKBERRY UP HERE TO TAKE A CALL. I'M
15 GOING TO READ YOU A QUOTE FROM THAT CASE. HERE WE HAVE HEARD
16 THE STATE TESTIFY THAT OVERCROWDING IS SOMETHING THAT THEY CAN
17 DEAL WITH AND THAT ONE COULD IMAGINE A SYSTEM IN WHICH
18 CONSTITUTIONAL MEDICAL AND MENTAL HEALTH CARE IS DELIVERED IN A
19 SYSTEM OF OVERCROWDING AND THE RISK OF PUBLIC SAFETY IS JUST
20 TOO GREAT.

21 HOWEVER, THE TRIAL COURT IN THAT CASE INDICATED THAT:

22 "THE OVERCROWDING IS A CRISIS CREATING CONDITIONS
23 OF EXTREME PERIL TO THE SAFETY OF PERSONS AND
24 PROPERTY WITHIN THE STATE WHICH ARE OR ARE LIKELY
25 WILL BE BEYOND THE CONTROL OF ANY SINGLE COUNTY OR

1 CITY IN CALIFORNIA."

2 JUDGE REINHARDT: IS THAT THE TRIAL COURT OR COURT OF
3 APPEALS?

4 JUDGE KARLTON: THAT'S THE COURT OF APPEALS.

5 MS. LEONARD: THE COURT OF APPEALS.

6 WITH THAT BEING ONE OF THE REQUIREMENTS TO ALLOW THAT
7 PROCLAMATION TO STAND.

8 NOW, AS TO WHETHER OR NOT IT SHOULD STAND AS A
9 PROCEDURAL ISSUE, BUT AS I UNDERSTAND IT, THAT WAS THE STATE'S
10 REPRESENTATION AT THAT TIME.

11 AND PERHAPS THE OVERCROWDING CONDITION HAS BECOME
12 MORE CONTROLLABLE FOR THE STATE, BUT WE WOULD BE UNCLEAR AS TO
13 HOW THAT WOULD HAPPEN BECAUSE NOW THE POPULATION IS LARGER THAN
14 IT WAS AT THE TIME THAT THIS CASE WAS FILED AND AT THE TIME THE
15 CASE WAS ARGUED.

16 WHEN I BEGAN, MY INTENTION IN THIS ARGUMENT WAS TO
17 TALK TO THE DEFENDANTS' CONTENTION THAT THE EXPERTS MAY NOT
18 HAVE SEEN ENOUGH OF THE CDCR SYSTEM, MAY HAVE COME ON THE BEST
19 DAY, MAY NOT HAVE VISITED ENOUGH PRISONS.

20 AND WE TRIED TO SHOW YOU IN THIS CASE THAT WE PICKED
21 SIX REPRESENTATIVE MEMBERS, BUT WE REALLY COULD HAVE PLUCKED
22 ANY ONE OF OUR 28,000 MEMBERS AND THEY WE HAVE SEEN THE SAME
23 THING THAT THE EXPERTS SAW IN THIS CASE.

24 I DON'T KNOW THAT I SHOULD TAKE THE COURT'S TIME TO
25 RECOUNT SOME OF THOSE VIGNETTES OR SOME OF THOSE STORIES

1 BECAUSE I THINK YOU ARE WELL AWARE AND YOU UNDERSTAND THE
2 SITUATION IN WHICH WE TOIL.

3 SO I THINK WHAT WE REALLY CAME TO SAY IS THAT
4 OVERCROWDING PERMEATES EVERY ASPECT OF CARE FROM PREVENTION --
5 FROM THE MOMENT THEY ARRIVE, TO THE MOMENT THEIR ISSUES ARE
6 TREATED, TO THE MOMENT THEY DEPART.

7 JUST LIKE ANY COMPLEX PROBLEM, THIS COULD HAVE ANY
8 NUMBER OF SOLUTIONS, BUT WE CAN'T BELIEVE THAT THE STATE IS
9 WILLING TO ACT. WE HAVE LEARNED THAT THE STATE NEEDS THE
10 LEADERSHIP OF THE FEDERAL COURT. IT NEEDS THE GUIDANCE OF THE
11 FEDERAL COURT. IT NEEDS THE OVERSIGHT OF THE FEDERAL COURT TO
12 DO THE RIGHT THINGS.

13 WE SPEND OUR DAYS TRYING TO DO THE RIGHT THING ON
14 SHIFTS AS LONG AS 16 HOURS. TO GIVE YOU AN EXAMPLE, IF WE WERE
15 TO HAVE A 16-HOUR SHIFT TODAY, OUR ORAL ARGUMENT WOULD EXTEND
16 UNTIL MIDNIGHT. ANYONE INTERESTED IN THAT? I DON'T THINK SO.

17 SO WE ASK FOR YOUR GUIDANCE. WE ASK FOR YOUR
18 SUPPORT. WE ASK TO HAVE INPUT INTO THE SOLUTION AS IT'S GIVEN
19 AND WE ASK FOR IT NOW. THANK YOU.

20 **JUDGE REINHARDT:** THANK YOU, COUNSEL.

21 **JUDGE HENDERSON:** THANK YOU, COUNSEL.

22 **CLOSING ARGUMENT**

23 **MR. MELLO:** GOOD AFTERNOON, YOUR HONORS. PAUL MELLO
24 OF HANSEN BRIDGETT.

25 **JUDGE KARLTON:** MR. MELLO, WHO DO YOU REPRESENT?

1 **MR. MELLO:** I REPRESENT THE STATE OF CALIFORNIA, THE
2 NAMED DEFENDANTS IN THE PLATA CASE.

3 **JUDGE KARLTON:** AND HOW IS IT THAT YOU ARE
4 REPRESENTING THE STATE HERE AND TAKING POSITIONS WHICH ARE
5 CLEARLY CONTRADICTED BY THE STATE'S DECLARATION OF AN EMERGENCY
6 PROCLAMATION CONFIRMED BY THE STATE COURTS, BECAUSE THERE WAS
7 AN EMERGENCY OF SUCH A CHARACTER AS TO REQUIRE AND SUPPORT THE
8 GOVERNOR'S EMERGENCY PROCLAMATION?

9 **MR. MELLO:** YOUR HONOR, YOU CITED AND I LOOKED AT
10 BRIEFLY THE CASE, THE CCPOA CASE THAT THIS COURT BROUGHT UP AT
11 THE BEGINNING --

12 **JUDGE KARLTON:** THERE IS SOMETHING WRONG WITH THE
13 MICROPHONE AGAIN.

14 **MR. MELLO:** CAN YOU NOT HEAR ME?

15 **JUDGE KARLTON:** I'M HAVING TROUBLE.

16 **THE CLERK:** I HAVE NO CONTROL.

17 **JUDGE KARLTON:** IS IT ON?

18 **THE CLERK:** YES, IT IS ON.

19 **JUDGE KARLTON:** ALL RIGHT. GO AHEAD.

20 **MR. MELLO:** LET ME TRY AGAIN.

21 YOU CITED THAT CASE. WE HAVE LOOKED AT THAT CASE.
22 I NOW KNOW THE CASE OR KNOW OF THE CASE. THAT CASE UPHELD THE
23 GOVERNOR'S AUTHORITY TO ISSUE AN EMERGENCY PROCLAMATION.

24 IN THAT CASE THE GOVERNOR ISSUED AN EMERGENCY
25 PROCLAMATION WITH RESPECT TO OVERCROWDING IN 29 OF 33

1 INSTITUTIONS. IT DIRECTLY RELATED TO THE USE OF BAD BEDS IN 29
2 OF 33 INSTITUTIONS.

3 IT UPHELD THE EMERGENCY PROCLAMATION WITH RESPECT TO
4 THAT PROVISION. THAT EMERGENCY PROCLAMATION DOES NOT DIRECTLY
5 RELATE TO THE ISSUES IN THIS COURT.

6 **JUDGE KARLTON:** AS I SOMETIMES SAY TO LAWYERS WHO ARE
7 NOT NEARLY AS EXPERIENCED AS YOU ARE, IT ISN'T ENOUGH TO HAVE A
8 DISTINCTION. IT'S NECESSARY TO HAVE A DISTINCTION THAT MAKES A
9 DIFFERENCE. THE EXISTENCE OF THE CROWDING IS A STATED POLICY
10 OF YOUR CLIENT.

11 **MR. MELLO:** UNDERSTOOD.

12 **JUDGE KARLTON:** THAT -- MY INITIAL --

13 **MR. MELLO:** I CAN SPEAK MORE TO THAT ISSUE IF YOU
14 WOULD LIKE, YOUR HONOR. THIS IS NOT AN OVERCROWDING LAWSUIT.
15 THAT RELATES TO OVERCROWDING.

16 PLAINTIFFS MUST PROVE BY CLEAR AND CONVINCING
17 EVIDENCE IN THIS CASE THAT OVERCROWDING IS THE PRIMARY CAUSE OF
18 THE UNCONSTITUTIONAL DELIVERY OF MEDICAL CARE.

19 **JUDGE KARLTON:** YOU ARE PREPARED TO SAY THAT THERE IS
20 THIS TERRIFIC OVERCROWDING THAT THE GOVERNOR HAS RECOGNIZED,
21 INDICATED THAT IT IS DANGEROUS BY VIRTUE OF THE OVERCROWDING,
22 THAT IT CREATES MEDICAL CONDITIONS BY VIRTUE THEREOF, AND
23 THREATENS THE SAFETY OF PEOPLE, BUT THAT SOMEHOW OR OTHER THAT
24 DOES NOT RELATE TO THIS CASE?

25 **MR. MELLO:** WHAT I'M PREPARED TO SAY IS THAT THE

1 RECORD THAT IS BEFORE THIS THREE-JUDGE PANEL, WHICH I
2 BELIEVE -- I'M A LITTLE BIT CONFUSED BY, BECAUSE I BELIEVE THAT
3 THE RECORD CLOSED ON DECEMBER 19TH AND WE'VE NOW HAD ADDITIONAL
4 ITEMS MOVED INTO EVIDENCE BY PLAINTIFFS' COUNSEL WHICH
5 DEFENDANTS HAVEN'T HAD AN OPPORTUNITY TO REBUT.

6 I'M UNCLEAR AS TO WHAT THE RECORD IS IN FRONT OF THIS
7 COURT. WE'VE HEARD CITATIONS TO THE RECEIVER'S TENTH REPORT,
8 WHICH THIS COURT VERY SPECIFICALLY TOLD US WHEN DISCOVERY CUT
9 OFF, VERY SPECIFICALLY TOLD US WHEN THE CONDITIONS WERE FIXED,
10 AND VERY SPECIFICALLY TOLD US THAT THE ONLY THING THAT CAN BE
11 CONSIDERED AFTER AUGUST 30TH, 2008 WAS EVIDENCE FROM THE
12 RECEIVER'S NINTH REPORT, NOT HIS TENTH REPORT, AND IF THERE
13 WERE ANY DEVELOPMENTS IN THE LEGISLATURE. AND, UNFORTUNATELY,
14 THERE HAVEN'T BEEN ANY.

15 I'VE HEARD EVIDENCE WITH RESPECT TO THE GOVERNOR'S
16 VETO. I WOULD LIKE TO SPEAK TO THAT. LET'S TALK ABOUT THE
17 VETO. THE VETO DID, IN FACT -- THE GOVERNOR DID, IN FACT, VETO
18 THE FIX FOR AB900. AND WHY IS THAT? THAT IS BECAUSE THE
19 PACKAGE OF BILLS THAT WENT TO THE GOVERNOR WAS LINKED, MEANING
20 HE COULDN'T PICK AND CHOOSE WHICH ONES HE HAD TO VETO OR NOT
21 VETO. THEY WERE LINKED. AND THOSE PACKAGE OF BILLS DID NOT
22 ADDRESS THE FISCAL CRISIS AND ECONOMIC EMERGENCY WITH RESPECT
23 TO THE BUDGET. HE HAD NO CHOICE, AND THAT'S WHAT HE HAS SAID.

24 **JUDGE REINHARDT:** I THINK THAT POSITION WAS MADE
25 CLEAR AT THE LAST HEARING. AS I RECALL, IT DOESN'T SOUND NEW

1 TO ME.

2 **MR. MELLO:** WELL, I DON'T BELIEVE HE VETOED IT AT THE
3 LAST HEARING. IT HAPPENED AFTERWARDS.

4 **JUDGE REINHARDT:** WELL, I THOUGHT SOMEBODY EXPLAINED
5 THAT.

6 **MR. MELLO:** THE VETOES HAPPENED SUBSEQUENTLY TO THE
7 LAST TIME WE WERE TOGETHER, YOUR HONOR.

8 **JUDGE REINHARDT:** I REMEMBER HEARING THAT IT WAS NOT
9 BECAUSE OF THE -- BECAUSE HE DISAPPROVED OF THE PROVISIONS
10 RELATING TO THAT, BUT BECAUSE IT WAS A -- MAYBE I IMAGINED IT.
11 I THOUGHT I HEARD THAT IN COURT, THAT THE STATE WAS SAYING IT
12 WAS NOT HE DISAPPROVED OF IT.

13 **MR. MELLO:** CORRECT, BUT IT IS BEING USED AS SOME
14 SORT OF EVIDENCE THAT THE GOVERNOR DOESN'T WANT TO FIX THE
15 AB900.

16 **JUDGE KARLTON:** NO, NO.

17 **JUDGE REINHARDT:** IT'S NOT VERY PERSUASIVE --

18 **JUDGE KARLTON:** THE QUESTION -- GO AHEAD. IT DOESN'T
19 MATTER. I DON'T KNOW WHETHER OR NOT YOU CAN ARGUE AS A MATTER
20 OF LAW, WHETHER YOU CAN ARGUE CONTRARY TO THE GOVERNOR'S STATED
21 POSITION. THAT'S THE FIRST QUESTION.

22 DO YOU HAVE THE AUTHORITY TO CONTRADICT THE
23 GOVERNOR'S FINDINGS OF FACT WHICH UNDERLIE THE PROCLAMATION?

24 **MR. MELLO:** THE EMERGENCY PROCLAMATION THAT
25 UNDERLIES -- THAT YOU ARE SPEAKING TO DOES NOT SAY AS THIS

1 COURT MUST FIND THAT OVERCROWDING IS A PRIMARY CAUSE OF THE
2 UNCONSTITUTIONAL DELIVERY OF MEDICAL CARE.

3 **JUDGE KARLTON:** LET'S START AT THE BEGINNING.

4 DO YOU ACKNOWLEDGE THAT THERE IS OVERCROWDING WHICH
5 CREATES DANGERS OF -- I'M SORRY. I HAVE FORGOTTEN THE
6 LANGUAGE. BUT GIVES RISE TO DANGERS OF HEALTH, DANGERS FOR
7 BOTH --

8 **MR. MELLO:** THE GOVERNOR OF THE STATE OF CALIFORNIA
9 ACKNOWLEDGED THAT AND THAT'S WHY HE ISSUED AN EMERGENCY
10 PROCLAMATION --

11 **JUDGE KARLTON:** DO YOU ACKNOWLEDGE THAT THAT IS TRUE
12 IN THIS CASE?

13 **MR. MELLO:** THERE IS OVERCROWDING. THAT'S --

14 **JUDGE KARLTON:** I'M ASKING A DIFFERENT QUESTION. LET
15 ME FIND THE LANGUAGE.

16 **JUDGE HENDERSON:** EMERGENCY SERVICE, THAT MAKES CLEAR
17 THAT IN SITUATIONS OF EXTREME PERIL TO THE PUBLIC WELFARE THE
18 STATE MAY EXERCISE.

19 **JUDGE KARLTON:** RIGHT. SPECIFICALLY THE GOVERNOR
20 PROCLAMATION FOUND THAT THE SEVERE PRISON OVERCROWDING CAUSED
21 SUBSTANTIAL RISK TO THE HEALTH AND SAFETY OF THE MEN AND WOMEN
22 WHO WORK INSIDE THESE PRISONS AND THE INMATES WHO ARE HOUSED
23 THEREIN.

24 DO YOU ACKNOWLEDGE THAT?

25 **MR. MELLO:** OF COURSE. IT IS THE EMERGENCY

1 PROCLAMATION --

2 **JUDGE KARLTON:** DO YOU ACKNOWLEDGE THE FACT?

3 **MR. MELLO:** YES. IT'S IN THE EMERGENCY PROCLAMATION.

4 I HAVE ACKNOWLEDGED THE FACT. I DO NOT ACKNOWLEDGE NOR HAVE
5 PLAINTIFFS PROVED THAT THAT OVERCROWDING IS THE PRIMARY CAUSE
6 OF THE UNCONSTITUTIONAL DELIVERY OF THE HEALTHCARE AND THAT A
7 PRISONER RELEASE ORDER IS THE ONLY RELIEF THAT WILL REMEDY.

8 **JUDGE REINHARDT:** THOSE ARE TWO DIFFERENT THINGS.

9 **MR. MELLO:** I AGREE.

10 **JUDGE REINHARDT:** LET'S TAKE THE FIRST.

11 DO YOU ACKNOWLEDGE THAT THE OVERCROWDING IS A CAUSE
12 OF ILLNESSES, WHATEVER, I DON'T KNOW -- UNFORTUNATELY, I DIDN'T
13 BRING IT IN, BUT THAT THE OVERCROWDING IS THE CAUSE OF THE
14 HEALTH PROBLEMS IN THE PRISON?

15 **MR. MELLO:** THAT OVERCROWDING IS THE --

16 **JUDGE REINHARDT:** I'M NOT ASKING YOU WHETHER IT'S THE
17 PRIMARY CAUSE.

18 **MR. MELLO:** WHETHER IT CONTRIBUTES?

19 **JUDGE REINHARDT:** WELL, WHETHER --

20 **JUDGE KARLTON:** WELL, WHAT I READ WAS THAT THE
21 GOVERNOR'S PROCLAMATION FOUND THAT SEVERE PRISON OVERCROWDING
22 CAUSED -- CAUSED SUBSTANTIAL RISK TO THE HEALTH AND SAFETY OF
23 THE MEN AND WOMEN WHO WORKED INSIDE THE PRISONS AND THE INMATES
24 HOUSED IN THEM.

25 OR THE PROCLAMATION FURTHER FOUND THAT THERE WAS AN

1 INCREASED SUBSTANTIAL RISK TO THE HEALTH AND SAFETY OF CDCR
2 STAFF, INMATES AND THE PUBLIC.

3 **MR. MELLO:** THAT'S WHAT THE EMERGENCY PROCLAMATION
4 SAYS.

5 **JUDGE KARLTON:** NO.

6 **JUDGE REINHARDT:** SO YOU ACKNOWLEDGE THAT THE
7 OVERCROWDING IS A CAUSE?

8 **MR. MELLO:** CORRECT.

9 **JUDGE REINHARDT:** AND YOUR ONLY DISAGREEMENT IS IT'S
10 NOT THE PRIMARY CAUSE?

11 **MR. MELLO:** CORRECT. I MEAN, THAT STATEMENT IS IN
12 EVIDENCE. THEY MOVED FOR IT INTO EVIDENCE BEFORE. WE ARE NOT
13 DISPUTING THE EMERGENCY PROCLAMATION AND WHAT IT SAYS.

14 WHAT WE ARE DISPUTING IS WHETHER PLAINTIFFS MET THEIR
15 BURDEN UNDER THE PLRA.

16 **JUDGE REINHARDT:** SHOWING THAT IT'S THE PRIMARY
17 CAUSE?

18 **MR. MELLO:** CORRECT. AND THAT A PRISONER RELEASE
19 ORDER IS THE ONLY FIX.

20 **JUDGE KARLTON:** THAT'S A SEPARATE QUESTION.

21 **JUDGE REINHARDT:** THAT'S A SEPARATE ISSUE. WE ONLY
22 GET TO THE PRISONER RELEASE ORDER IF IT'S THE PRIMARY CAUSE.

23 **MR. MELLO:** OF COURSE.

24 **JUDGE REINHARDT:** SO THE ISSUE, AS FAR AS YOU'RE
25 CONCERNED, IS THAT IT IS A CAUSE OF THE HEALTH PROBLEMS IN THE

1 PRISONS.

2 **MR. MELLO:** WE'VE NEVER DISPUTED THAT OVERCROWDING --

3 **JUDGE REINHARDT:** AND YOUR ONLY ISSUE IS WHETHER IT'S
4 A PRIMARY CAUSE AS OPPOSED TO A CAUSE?

5 **MR. MELLO:** YES.

6 **JUDGE REINHARDT:** AND THE GOVERNOR'S POSITION IS THAT
7 IT'S A CAUSE, NOT A PRIMARY CAUSE.

8 **MR. MELLO:** WELL, THE GOVERNOR'S POSITION IS SPELLED
9 OUT IN THE EMERGENCY PROCLAMATION.

10 **JUDGE REINHARDT:** NO, OUR CURRENT GOVERNOR, AT THIS
11 POINT.

12 **MR. MELLO:** AT THIS POINT -- WELL, LET ME BACK UP.
13 THE EMERGENCY PROCLAMATION WAS SIGNED IN 2006. IT
14 WAS BASED UPON CURRENT CONDITIONS.

15 **JUDGE KARLTON:** RIGHT. IT'S WORSE NOW. THERE ARE
16 MORE PRISONERS.

17 **MR. MELLO:** I DON'T BELIEVE THAT'S TRUE. I BELIEVE
18 THAT DEFIES THE RECORD IN THIS CASE, THAT IT'S WORSE NOW.

19 **JUDGE KARLTON:** NO, SIR. AT THE TIME THAT THE
20 GOVERNOR ANNOUNCED THE PROCLAMATION, THERE WERE 166,148
21 PRISONERS. THERE ARE MORE NOW. IS THAT RIGHT?

22 **MR. MELLO:** THERE MAY BE MORE PRISONERS UNDER THE
23 CARE OF CDCR. HOWEVER, THE QUESTION IS HOW MANY PRISONERS?
24 BECAUSE WE ARE FOCUSED ON THE 33 ADULT INSTITUTIONS IN STATE,
25 HOW MANY PRISONERS ARE NOW IN ADULT INSTITUTIONS?

1 AND I BELIEVE THAT THE POPULATION IN IN-STATE ADULT
2 INSTITUTIONS HAS GONE DOWN AND ONE OF THE REASONS IT'S GONE
3 DOWN, I BELIEVE, YOUR HONOR, IS BECAUSE OF THE EMERGENCY
4 PROCLAMATION WHICH ALLOWED --

5 **JUDGE KARLTON:** THERE ARE ONLY 8,000 PEOPLE WHO HAVE
6 BEEN SHIPPED OUT. THERE ARE ONLY 8,000 PEOPLE.

7 **MR. MELLO:** I BELIEVE THE EVIDENCE BEFORE THIS COURT
8 IS THAT THE POPULATION IS LOWER NOW AS OF AUGUST 30, 2008 IN
9 THE IN-STATE INSTITUTIONS THAN IT WAS AT THE TIME OF THE
10 EMERGENCY PROCLAMATION.

11 **JUDGE KARLTON:** ALL RIGHT.

12 **MR. MELLO:** AND I BELIEVE THAT THE EMERGENCY
13 PROCLAMATION WAS SIGNED IN 2006, AND THAT IT WAS BASED UPON THE
14 CONDITIONS THEN.

15 THAT BEING SAID -- AND I DON'T DISPUTE THAT THE
16 GOVERNOR HAS NOT REPEALED THE EMERGENCY PROCLAMATION, SO
17 MR. SPECTER AND MR. BIEN DON'T NEED TO COME UP AND SAY THAT.
18 IT'S STILL IN EFFECT.

19 **JUDGE KARLTON:** BUT IT JUST DOESN'T MATTER.

20 **MR. MELLO:** NO. THE GOVERNOR HAS NEVER SAID THAT AND
21 I'M NOT SAYING THAT.

22 I'M SAYING THAT PLAINTIFFS HAVE A VERY HIGH AND
23 EXACTING BURDEN TO MEET HERE AND THEY HAVEN'T MET IT.

24 **JUDGE REINHARDT:** IT WOULD SEEM TO ME, MR. MELLO,
25 THAT IF THE GOVERNOR HAD DECLARED A STATE OF EMERGENCY BECAUSE

1 OF EXTREME PERIL TO LIFE, PROPERTY AND RESOURCES OF THE STATE
2 DUE TO OVERCROWDING AND THAT YOU NEED THIS TO PROTECT THE
3 HEALTH AND SAFETY OF THE PEOPLE, INCLUDING THE INMATES, IT'S
4 PRETTY HARD -- IT'S A HIGH BURDEN --

5 **MR. MELLO:** RIGHT.

6 **JUDGE REINHARDT:** -- WHEN THAT'S IN EVIDENCE TO SAY
7 THAT THEY HAVE NOT SHOWN THAT THE OVERCROWDING IS A PRIMARY
8 CAUSE OF THIS EXTREME PERIL THAT THE GOVERNOR FOUND.

9 **MR. MELLO:** WELL, CAN WE SPEAK TO THE EVIDENCE THAT
10 WAS PRESENTED AT THE TRIAL IN THIS CASE ON THAT VERY ISSUE?

11 **JUDGE REINHARDT:** THIS IS PART OF THE GOVERNOR'S
12 PROCLAMATION.

13 **MR. MELLO:** RIGHT. AND I THINK WE'VE SPENT A LOT OF
14 TIME --

15 **JUDGE REINHARDT:** I DON'T KNOW THAT THEY NEED ANY
16 MORE THAN THE GOVERNOR'S PROCLAMATION. WHEN THEY FIND THE
17 STATE OF EMERGENCY EXISTS WITH CONDITION OF EXTREME PERIL TO
18 THE SAFETY OF THE PRISONERS AND THE GUARDS, WHAT MORE DO YOU
19 NEED THAN THAT IF HE SAYS THAT THIS CONDITION CREATES IN ITSELF
20 AN EXTREME STATE OF EMERGENCY -- THE STATE OF EXTREME
21 EMERGENCY?

22 **JUDGE KARLTON:** THE PROCLAMATION SAYS -- I MEAN AMONG
23 OTHER THINGS, FOUND -- THE GOVERNOR'S PROCLAMATION FOUND THAT
24 SEVERE PRISON OVERCROWDING CAUSED SUBSTANTIAL RISK TO THE
25 HEALTH AND SAFETY, ET CETERA, ET CETERA.

1 WITH SO MANY INMATES HOUSED TOGETHER IN TRIPLE BUNKS,
2 IN LARGE COMMON AREA, THERE EXISTED AN INCREASED SUBSTANTIAL
3 RISK OF VIOLENCE, AN INCREASED SUBSTANTIAL RISK FOR
4 TRANSMISSION OF INFECTIOUS DISEASES, AN INCREASED SUBSTANTIAL
5 RISK DUE TO LINE OF SIGHT PROBLEMS, ET CETERA, ET CETERA.

6 YOU DON'T THINK THAT THAT SAYS THAT IT'S A PRIMARY
7 CAUSE?

8 **MR. MELLO:** I DON'T BELIEVE IT SAYS THAT. AND I
9 BELIEVE THAT THE ONLY THING THAT THAT SAID WITH RESPECT TO
10 MEDICAL CARE DELIVERY IN THIS CASE IS THAT WITH RESPECT TO THE
11 SPREAD OF DISEASE. THE SAME SPREAD OF DISEASE THAT HAPPENS IN
12 THE HOSPITAL THAT MY WIFE WORKS IN. THE SAME SPREAD OF DISEASE
13 THAT HAPPENS IN THE HALLWAYS OF BART. THAT'S THE ONLY THING
14 THAT I THINK SPEAKS TO THE ISSUE IN THIS CASE WHEN WE TALK
15 ABOUT PRIMARY CAUSE.

16 BUT, CLEARLY, THE COURT -- YOUR HONOR DISAGREES WITH
17 ME. I WOULD BE GLAD TO ADDRESS OTHER FAILINGS IN PLAINTIFFS'
18 CASE, IF YOU WOULD LIKE.

19 **JUDGE KARLTON:** GO RIGHT AHEAD.

20 **MR. MELLO:** FIRST OF ALL, I BELIEVE THIS COURT HAS TO
21 DECIDE WHETHER TO ISSUE A PRISONER RELEASE ORDER. THAT'S WHAT
22 IT WAS CONVENED FOR. THIS COURT MUST DECIDE THAT ON THE RECORD
23 BEFORE THE COURT.

24 AND I BELIEVE MR. BIEN MADE A CRITICAL ADMISSION THAT
25 DEMONSTRATE THAT PLAINTIFFS' REQUESTED RELIEF CANNOT BE MET,

1 THAT THEY CANNOT GET THE RELIEF THEY REQUEST.

2 HE HAS ADMITTED TO THIS COURT, AS THE EVIDENCE SHOWS,
3 THAT A PRISONER RELEASE ORDER WON'T REMEDY THE CONSTITUTIONAL
4 VIOLATION AT ISSUE. THIS IS NOT AN OVERCROWDING CASE. THE
5 PLRA SAYS SPECIFICALLY WHAT THIS COURT MUST FIND.

6 **JUDGE REINHARDT:** GO BACK, BECAUSE I ASKED THAT
7 QUESTION, I BELIEVE.

8 IS IT YOUR POSITION THAT IF WE FIND THAT OVERCROWDING
9 IS A PRIMARY CAUSE, THEN WE DO HAVE THE AUTHORITY TO REMEDY THE
10 ENTIRE CONSTITUTIONAL VIOLATION BY DOING MORE THAN ISSUE A
11 PRISONER RELEASE ORDER?

12 **MR. MELLO:** I BELIEVE THIS COURT WAS CONVENED TO
13 DECIDE WHETHER OR NOT TO ISSUE A PRISONER RELEASE ORDER. IT
14 WAS NOT CONVENED TO DECIDE OTHER ISSUES.

15 **JUDGE REINHARDT:** WELL, I DON'T KNOW WHY IT'S
16 CONVENED, BUT THE STATUTE SAYS THAT WE CAN'T ISSUE A PRISONER
17 RELEASE ORDER UNLESS IT'S DUE TO OVERCROWDING, THAT THE
18 CONSTITUTIONAL VIOLATION IS DUE TO THAT.

19 IT DOESN'T SAY -- I'M NOT SUGGESTING WE WANT TO DO
20 ANY MORE, BUT I DON'T THINK IT SAYS THAT THE COURT CANNOT DO
21 MORE THAN ISSUE A PRISONER RELEASE ORDER.

22 **MR. MELLO:** CAN I BACK UP AND MAKE MY POINT AND THEN
23 COME BACK TO YOUR POINT IF I MAY?

24 THE PLRA SAYS THAT:

25 "THE THREE-JUDGE COURT SHALL ENTER A PRISONER

1 RELEASE ORDER ONLY IF THE COURT FINDS BY CLEAR AND
2 CONVINCING EVIDENCE THAT PRIMARY CAUSE."

3 WHICH YOU FOLKS SEEM TO DISAGREE WITH ME.

4 **JUDGE REINHARDT:** NO, NO. I DON'T DISAGREE WITH YOU.

5 **JUDGE KARLTON:** I DO.

6 **MR. MELLO:** (CONTINUING)

7 "AND NO OTHER RELIEF WILL REMEDY THE VIOLATION OF
8 THE FEDERAL RIGHT."

9 THE VIOLATION OF THE FEDERAL RIGHT THAT MUST BE
10 REMEDIED HERE IS NOT OVERCROWDING. IT'S DELIVERY OF MEDICAL
11 CARE.

12 MR. BIEN TOLD YOU THAT THE PRISONER RELEASE ORDER HE
13 REQUESTS WILL NOT REMEDY IT.

14 **JUDGE KARLTON:** MR. MELLO. MR. MELLO. WE ALL AGREE
15 THAT THIS COURT IS NOT IN THE BUSINESS OF -- THIS THREE-JUDGE
16 COURT -- WELL, AND, ALSO, THE PRECEDING COURT IS NOT IN THE
17 BUSINESS OF SOLVING OVERCROWDING. THAT'S A DIFFERENT LAWSUIT
18 THAT HASN'T BEEN FILED.

19 THE QUESTION THAT IS BEFORE US IS WHETHER OR NOT THE
20 EVIDENCE IS NOT ONLY CLEAR AND CONVINCING, BUT OVERWHELMING
21 THAT THE OVERCROWDING IS THE PRIMARY CAUSE.

22 THE FACT THAT IT BY ITSELF WILL NOT SOLVE THE PROBLEM
23 DOESN'T ANSWER THE QUESTION OF WHETHER IT'S A PRIMARY CAUSE.
24 YOU SEEM TO THINK THAT FOR THERE TO BE A PRIMARY CAUSE IT'S GOT
25 TO SOLVE THE PROBLEM.

1 **MR. MELLO:** OKAY. EVEN IF THAT'S WHAT I THINK, I
2 THINK I'M NOW SPEAKING TO THE SECOND PRONG OF THE FIRST CLEAR
3 AND CONVINCING STANDARD.

4 **JUDGE KARLTON:** LET'S TAKE THE FIRST PRONG. DO YOU
5 AGREE OR DISAGREE -- IT'S VERY DIFFICULT BECAUSE I DON'T KNOW
6 WHO YOU REPRESENT.

7 BUT IF YOU AGREE -- DO YOU AGREE OR DISAGREE THAT THE
8 QUESTION OF PRIMARY CARE DOES NOT MEAN -- PRIMARY CAUSE DOES
9 NOT MEAN THAT FINDING OVERCROWDING AND REDUCING OVERCROWDING
10 WOULD END THE ISSUE; THAT IS, THAT THERE WOULD CONTINUE TO BE
11 OTHER CAUSES WHICH HAVE TO BE ADDRESSED AS WELL?

12 **MR. MELLO:** I THINK WITH RESPECT TO PRIMARY CAUSE,
13 WHETHER IT'S THE PRIMARY CAUSE OR NOT, MY BELIEF, AND I BELIEVE
14 IT WAS IN OUR MOTION IN LIMINE, THAT PRIMARY CAUSE MEANS JUST
15 THE BIGGEST CAUSE. I'M NOT SAYING IT HAS TO BE THE ONLY CASE.

16 **JUDGE KARLTON:** OKAY. SO THAT IF IT TURNS OUT THAT,
17 YES, WE FIND IT'S A PRIMARY CAUSE, YES, WE FIND THAT IT WILL
18 NOT IN ITSELF CURE THE CONSTITUTIONAL DEFECT, WE NONETHELESS
19 HAVE NOT ONLY THE POWER, BUT THE OBLIGATION TO SET A CAP. IS
20 THAT RIGHT?

21 **MR. MELLO:** I DISAGREE.

22 **JUDGE KARLTON:** THAT'S WHAT I'M ASKING.

23 **MR. MELLO:** I BELIEVE THAT IF THIS COURT FINDS, WHICH
24 I THINK IT MUST AND AS MR. BIEN ADMITTED UP HERE A FEW MOMENTS
25 AGO, THAT IT WON'T REMEDY THE CONSTITUTIONAL VIOLATION, THEN IT

1 CAN'T BE A FIX AND YOU DON'T MEET --

2 **JUDGE REINHARDT:** SIR, IF IT'S THE PRIMARY CAUSE AND
3 THERE ARE TWO OTHER CAUSES --

4 **MR. MELLO:** CORRECT.

5 **JUDGE REINHARDT:** -- AND WE CAN ELIMINATE THE PRIMARY
6 CAUSE, THAT BECAUSE THERE ARE OTHER CAUSES WE CAN'T DO
7 ANYTHING?

8 **MR. MELLO:** I MEAN, THE STATUTE SAYS WHAT THE STATUTE
9 SAYS. IT SAYS NO OTHER RELIEF WILL REMEDY THE VIOLATION OF THE
10 PRESENT -- OF THE -- OTHER THAN A PRISONER RELEASE ORDER.

11 **JUDGE REINHARDT:** NO OTHER RELIEF THAT THE COURT IS
12 AUTHORIZED TO GRANT.

13 **MR. MELLO:** WELL, THAT'S NOT WHAT IT SAYS. BUT
14 THAT'S MY UNDERSTANDING.

15 **JUDGE REINHARDT:** WELL, YOUR UNDERSTANDING, NO OTHER
16 RELIEF, WHETHER OR NOT WE CAN GRANT IT.

17 **MR. MELLO:** RIGHT. I MEAN, I THINK WHAT THEY MEANT
18 WAS THAT A PRISONER RELEASE ORDER HAD TO CURE THE VIOLATION AND
19 IT'S -- IT'S EVIDENT THAT IT WON'T -- ACCORDING TO PLAINTIFFS,
20 WON'T CURE THE VIOLATION.

21 **JUDGE REINHARDT:** I THOUGHT WE COULD ONLY DEAL WITH
22 THE OVERCROWDING. YOU'RE SAYING WE CAN DEAL WITH ALL CAUSES?

23 **MR. MELLO:** NO. I'M SAYING THAT IF A PRISONER
24 RELEASE ORDER WILL NOT REMEDY THE MEDICAL CARE DEFICIENCIES
25 THAT ARE ALLEGED IN THE PLATA CASE.

1 **JUDGE REINHARDT:** THEN WHY WOULD WE BE INVOLVED IN IT
2 IF IT'S ONLY A PRIMARY CAUSE AND THERE ARE OTHER CAUSES?

3 **JUDGE KARLTON:** THAT'S THE MEANING OF THE EXISTENCE
4 OF OTHER CAUSES. YOU MAY NOT BE ABLE TO SOLVE THE PROBLEM OF
5 UNCONSTITUTIONAL CONDITIONS BY ELIMINATING THE PRIMARY CAUSE,
6 BUT IF YOU DON'T ADDRESS THE PRIMARY CAUSE, WE CAN NEVER
7 DELIVER SUFFICIENT CONSTITUTIONAL CARE.

8 **MR. MELLO:** AND I UNDERSTAND THE COURT'S POSITION,
9 BUT I'M SAYING THE STATE'S POSITION IS THAT IF -- IF IT WON'T
10 REMEDY IT, YOU CAN'T ISSUE THE PRISONER RELEASE ORDER.

11 I UNDERSTAND THAT THERE -- THAT IT'S THE COURT'S
12 POSITION THERE ARE MANY CAUSES. I'M NOT SAYING IT'S THE
13 COURT'S POSITION. THERE ARE MANY CAUSES.

14 **JUDGE REINHARDT:** LET'S ASSUME THERE ARE FIVE CAUSES.

15 **MR. MELLO:** CORRECT.

16 **JUDGE REINHARDT:** ARE WE AUTHORIZED TO DEAL WITH THE
17 OTHER FOUR CAUSES IN ADDITION TO OVERCROWDING?

18 **MR. MELLO:** I BELIEVE THIS COURT IS NOT. THE
19 UNDERLYING PLATA AND COLEMAN COURTS MAY BE AUTHORIZED TO DEAL
20 WITH THOSE OTHER ISSUES. LET ME GIVE YOU AN EXAMPLE.

21 AS AN EXAMPLE, ONE OF THE THINGS WE HEARD, THAT THERE
22 WERE LINES FOR MEDICATION, FOR DISTRIBUTING MEDICATION.

23 SOMETHING SHORT OF A PRISONER RELEASE ORDER MIGHT BE,
24 STATE, HAVE TWO LINES FOR MEDICATION. IT MIGHT BE, HIRE MORE
25 PHARMACISTS. IT MIGHT BE, HIRE MORE NURSES TO DISTRIBUTE

1 MEDICATIONS.

2 I DON'T BELIEVE THIS THREE-JUDGE PANEL CAN DO THAT,
3 BUT I BELIEVE THAT JUDGE HENDERSON COULD IN PLATA OR
4 JUDGE KARLTON. AND I DON'T REALLY WANT TO SPEAK TO THE COLEMAN
5 ISSUE.

6 **JUDGE REINHARDT:** IF WE CAN'T ELIMINATE THE PROBLEM
7 HERE, BUT WE CAN SUBSTANTIALLY REDUCE IT BY DEALING WITH THE
8 OVERCROWDING PROBLEM, THEN THERE ARE OTHER COURTS THAT CAN,
9 COMBINED WITH OURS, RESOLVE THE CONSTITUTIONAL PROBLEM.

10 BUT YOU'RE SAYING TO ME, AS I UNDERSTAND IT, IF WE
11 CAN'T SOLVE IT ALL BY OURSELVES WITHOUT RELYING ON THE OTHER
12 COURTS, THEN WE CAN'T ISSUE AN ORDER.

13 **MR. MELLO:** THAT'S THE POSITION THE STATE HAS WITH
14 RESPECT TO THE READING OF THE PLRA.

15 **JUDGE REINHARDT:** THAT JUST DOESN'T MAKE ANY SENSE.
16 I MEAN, THAT CAN'T BE.

17 **JUDGE KARLTON:** IT'S IMPORTANT, YOU KNOW, TO CONSTRUE
18 STATUTES SO THAT THEY ARE NOT FACIALLY ABSURD. WHAT YOU HAVE
19 JUST SUGGESTED IS FACIALLY ABSURD. SO WE HAVE TO REJECT THAT
20 INTERPRETATION.

21 **MR. MELLO:** OKAY.

22 **JUDGE REINHARDT:** LET'S TRY ANOTHER ONE.

23 **MR. MELLO:** OKAY. AND YOU'VE SAID WE COULD ISSUE --
24 IT'S YOUR OPINION -- OR I DON'T KNOW IF IT'S YOUR OPINION, BUT
25 THIS COURT COULD ISSUE SOMETHING THAT MIGHT BE THE FIRST STEP,

1 TO USE PLAINTIFFS' WORDS, TOWARDS CURING THE CONSTITUTIONAL
2 VIOLATIONS. AND THEN --

3 **JUDGE REINHARDT:** I DON'T KNOW THAT I SAID ANYTHING.
4 I'M ASKING THE QUESTIONS TRYING TO UNDERSTAND THE PARTIES'
5 POSITION ON THE STATUTE. AND I CAN'T BELIEVE YOUR POSITION IS
6 THAT YOU CAN'T ISSUE AN ORDER UNDER THE PLRA UNLESS
7 OVERCROWDING SOLVES THE ENTIRE PROBLEM, WHETHER OR NOT THE ACT
8 CONTEMPLATES IT IS ONLY A PRIMARY CAUSE AND THERE MAY BE OTHER
9 CAUSES.

10 YOU ARE TELLING US, I THINK, THAT IF THERE ARE OTHER
11 CAUSES AND WE CAN'T DEAL WITH THEM, THEN WE CAN'T ISSUE AN
12 ORDER.

13 **JUDGE KARLTON:** ISN'T THIS REALLY A QUESTION OF WHERE
14 REMEDIES LIE?

15 CONGRESS DECIDED FOR BETTER OR WORSE THAT THE
16 ISSUANCE OF A PRISON CAP IS SO SERIOUS THAT IT OUGHT NOT TO BE
17 DONE BY INDIVIDUAL JUDGES.

18 JUDGE HENDERSON IS NOT ABLE TO ISSUE A PRISON CAP
19 ORDER IN HIS CASE. I AM NOT ABLE TO ISSUE A PRISON CAP IN MY
20 CASE. I WOULD BE, BUT FOR THE FACT IS THAT CONGRESS MADE A
21 JUDGMENT, AND IT IS THAT WHEN YOU COME TO THAT ISSUE, IT IS OF
22 SUCH A SERIOUS NATURE AND SUCH AN INTRUSION UPON THE STATE'S
23 ORDINARY PROCESSES THAT IT REQUIRES THREE JUDGES.

24 ISN'T THAT THE RATIONAL EXPLANATION OF HOW WE GOT
25 HERE?

1 **MR. MELLO:** I GUESS. I MEAN, I WOULD BE GLAD TO
2 SPEAK TO OTHER ISSUES IN THE CASE BECAUSE CLEARLY YOU DON'T BUY
3 MY INTERPRETATION OF THE STATUTE. SO I WOULD BE GLAD TO GO TO
4 OTHER REASONS WHY PLAINTIFFS' CLAIMS FAIL IN THIS CASE.

5 **JUDGE REINHARDT:** OKAY.

6 **MR. MELLO:** AND I BELIEVE IT WAS JUDGE HENDERSON OR
7 ONE OF YOU THAT TOUCHED UPON THIS ISSUE, AND THAT IS -- AND
8 JUDGE KARLTON'S SPOKEN TO IT, TOO -- THE 130 PERCENT OF DESIGN
9 BED CAPACITY NUMBER, THE 95 PERCENT AT SPECIALTY CENTERS, WHICH
10 CAME UP FOR THE FIRST TIME, FRANKLY, IN THEIR PROPOSED FINDINGS
11 OF FACT AND CONCLUSIONS OF LAW.

12 AND I THINK THE RECORD -- THERE IS NO EVIDENCE BEFORE
13 THIS COURT TYING DESIGN CAPACITY TO THE CONSTITUTIONAL DELIVERY
14 OF MEDICAL CARE. THERE IS SIMPLY NO EVIDENCE.

15 THERE IS THE DUKMAJIAN REPORTS, THE EXPERT PANEL
16 REPORTS THAT TALK ABOUT PERCENTAGE OF DESIGN BED CAPACITY WITH
17 RESPECT TO THE DELIVERY OF PROGRAMS. THOSE HAVE NOTHING TO DO
18 WITH THE DELIVERY OF CONSTITUTIONALLY ADEQUATE MEDICAL CARE.

19 THERE IS A COMPLETE ABSENCE IN THE RECORD FROM ANY
20 TESTIMONY THAT SAYS -- WELL, LET ME BACK UP.

21 WE'VE HEARD MANY TERMS, DESIGN CAPACITY AND OPERABLE
22 CAPACITY DURING TRIAL, CORRECT? AND PLAINTIFFS' EXPERTS, I
23 BELIEVE SIX OF THEM, TESTIFIED THAT YOU COULD OPERATE
24 CONSTITUTIONALLY ADEQUATE MEDICAL CARE SYSTEMS IN PRISONS THAT
25 WERE OVERCROWDED.

1 AND I BELIEVE THAT FOUR EXPERTS TESTIFIED ABOUT
2 OPERABLE CAPACITY. AND THAT OPERABLE CAPACITY IS THE RELEVANT
3 INDICATOR. THEY DIDN'T SAY THAT IT WAS TIED TO DESIGN
4 CAPACITY. THEY SAID, WHAT IS THE OPERABLE CAPACITY? AT WHAT
5 POPULATION CAN A SYSTEM OPERATE CONSTITUTIONALLY ADEQUATE
6 MEDICAL CARE SYSTEMS?

7 AND THERE IS A COMPLETE ABSENCE IN THE RECORD FROM
8 PLAINTIFFS THAT SAYS WHAT THE OPERABLE CAPACITY OF CDCR'S
9 PRISONS IS, SYSTEM-WIDE, LET ALONE INSTITUTION TO INSTITUTION.

10 LET'S TAKE A HYPOTHETICAL TO ILLUSTRATE THE POINT.
11 IF A JAIL HAD A DESIGN BED CAPACITY OF 20 INMATES, BUT IT ONLY
12 HAD 10 INMATES AND IT ONLY HAD ONE PART-TIME LICENSED
13 VOCATIONAL NURSE, IT DIDN'T HAVE ANY DOCTORS, REGISTERED
14 NURSES, PHYSICIAN'S ASSISTANTS, NURSE PRACTITIONERS, PHARMACY
15 SERVICES, SPECIALTY SERVICES, HOSPITAL SERVICES, WOULD THE
16 POPULATION BE THE SINGLE BIGGEST BARRIER TO CARE TO THOSE 10
17 INMATES?

18 WOULD IT BE THE FACT THAT THERE ARE 10 INMATES IN A
19 PRISON THAT'S DESIGNED FOR 20 INMATES?

20 OR -- AND WOULD THE ONLY WAY TO CURE THE MEDICAL CARE
21 BEING RECEIVED BY THOSE 10 INMATES BE TO GET RID OF NINE OF
22 THOSE INMATES?

23 NO. IT WOULD BE, WHAT IS HAPPENING AND WHAT IS
24 IMPROVING IN CDCR RIGHT NOW. AND THAT IS THE HIRING OF
25 DOCTORS, THE HIRING OF NURSES, THE HIRING OF PHYSICIAN

1 EXTENDERS, NURSE PRACTITIONERS, PHYSICIAN'S ASSISTANTS,
2 IMPROVEMENTS OF PHARMACY SERVICES. THAT WOULD BE THE REASONS.

3 AND THERE IS A COMPLETE ABSENCE OF EVIDENCE AS TO
4 WHAT THE OPERABLE CAPACITY IS WITH RESPECT TO MEDICAL CARE AT
5 CDCR'S INSTITUTIONS FOR THE DELIVERY OF CONSTITUTIONALLY
6 ADEQUATE MEDICAL CARE. THERE IS NO EVIDENCE.

7 THAT'S NOT MY BURDEN TO PUT IN. THEY HAD TO PUT IT
8 IN BY CLEAR AND CONVINCING EVIDENCE. AND I DON'T BELIEVE THIS
9 COURT -- YES.

10 **JUDGE KARLTON:** MR. MELLO, ACTUALLY THIS BRINGS UP --
11 I WON'T SAY IT. THIS IS AN IMPORTANT ISSUE AND I FIND IT
12 TROUBLING, BUT THE SUGGESTION WAS MADE -- AND I CAN'T BELIEVE
13 SERIOUSLY, BUT THE SUGGESTION WAS MADE THAT WE FIND THAT THE
14 OVERCROWDING IS A NECESSARY -- IS THE PRIMARY PURPOSE.

15 AND THEN WE SAY TO THE STATE, YOU TELL US WHAT YOU
16 ARE GOING TO DO AND WHY YOU ARE GOING TO DO IT AND HOW YOU ARE
17 GOING TO DO IT. AND THAT WOULD INCLUDE, I SUPPOSE, IN SOME WAY
18 TYING THE APPROPRIATE LEVEL OF CARE TO THE APPROPRIATE PRISON
19 POPULATION.

20 WHAT THAT SAYS TO ME IS THEY'VE PROVEN THAT THE
21 CONDITIONS ARE SUCH THAT AN ORDER UNDER THE PLRA IS
22 APPROPRIATE, BUT THEY RECOGNIZE THAT IT IS A MULTI --
23 POLYCENTRIC, I THINK IS THE WORD WE USED LAST TIME, PROBLEM
24 THAT IS VERY COMPLEX AND THAT WE OUGHT TO GIVE THE STATE THE
25 FIRST OPPORTUNITY TO DO SO.

1 WHAT IS YOUR POSITION AS TO THE PROPRIETY OF TELLING
2 THE STATE THERE IS NO QUESTION THAT OVERCROWDING IS THE PRIMARY
3 CAUSE? THE QUESTION BECOMES ONE OF SOLUTION AND OF WHAT'S THE
4 PROPER REMEDY, AND THAT WE, AT LEAST INITIALLY, LEAVE TO THE
5 STATE?

6 **MR. MELLO:** OKAY. SO IF I UNDERSTAND IT, IF THE
7 COURT MEANT -- IF THE COURT WAS SATISFIED THAT THE PLRA WAS MET
8 WITH RESPECT TO PRIMARY CAUSE, ONLY REMEDY -- ONLY RELIEF THAT
9 WILL REMEDY -- AND THAT THERE IS NOT A SUBSTANTIAL ADVERSE
10 IMPACT UPON PUBLIC SAFETY --

11 **JUDGE KARLTON:** RIGHT.

12 **MR. MELLO:** -- AND THE ADMINISTRATION OF CRIMINAL
13 JUSTICE, WHICH I CAN ALSO SPEAK TO IF GIVEN THE OPPORTUNITY,
14 THAT I DON'T BELIEVE THEY MEET THAT EITHER; BUT THEN COULD THE
15 COURT FASHION A REMEDY THAT SAYS, STATE, YOU COME UP WITH WHAT
16 THE POPULATION HAS TO BE TO PROVIDE CONSTITUTIONALLY ADEQUATE
17 MEDICAL CARE?

18 I THINK THAT THIS COURT WOULD HAVE TO ISSUE EITHER A
19 -- WOULD HAVE TO ISSUE A PRISONER RELEASE ORDER AND THAT WOULD
20 BE EITHER A CAP OR THE RELEASE OR A REDUCTION PLAN. IT WOULD
21 HAVE TO GIVE THE STATE A NUMBER.

22 I DON'T THINK THAT THIS COURT CAN JUST SAY, REDUCE
23 YOUR POPULATION. I THINK THEY HAVE TO GIVE --

24 **JUDGE KARLTON:** WHY CAN'T WE? I MEAN, I DON'T KNOW.

25 I THINK THAT THIS IS A MUCH MORE DIFFICULT PROBLEM THAN THE

1 PLAINTIFFS DO.

2 BUT WHY CAN'T THE COURT, CONSISTENT WITH THE VIEW OF
3 THE PLRA THAT THE STATE OUGHT TO BE GIVEN AS MUCH ELBOW ROOM,
4 IF YOU WILL, TO COME UP WITH AN APPROPRIATE PLAN, WHY CAN'T WE
5 SAY, IT'S CLEAR THAT THE FIRST -- THAT ALL THE ELEMENTS HAVE
6 BEEN MET, BUT IT IS ESSENTIALLY THE STATE'S RESPONSIBILITY TO
7 DETERMINE WHAT LEVEL OF CARE, WHAT LEVEL OF POPULATION WILL BE
8 NECESSARY TO REDUCE TO SO THAT ALL OF THE OTHER ISSUES, ALL OF
9 THE OTHER CAUSES CAN ALSO BE ADDRESSED BY THE INDIVIDUAL
10 COURTS? WHAT IN THE STATUTE SAYS NO, THAT THAT'S NOT SOMETHING
11 YOU CAN DO?

12 **MR. MELLO:** WELL, I'LL JUST GO IN REVERSE ORDER, IF I
13 CAN.

14 **JUDGE KARLTON:** SURE.

15 **MR. MELLO:** FIRST OF ALL, I THINK JUDGE REINHARDT'S
16 CONCERN OF BEING AROUND THIS THREE-JUDGE PANEL, BEING AROUND
17 FOR A LONG TIME --

18 **JUDGE KARLTON:** WELL, THAT'S MY CONCERN.

19 **MR. MELLO:** OKAY, YOUR CONCERN. THEN THAT'S A
20 PROBLEM. BECAUSE YOU THEN ASKED THE STATE -- WHETHER OR NOT
21 THE PLRA AUTHORIZES IT, YOU ASKED THE STATE TO COME UP WITH A
22 PLAN.

23 I DOUBT THAT THE NUMBER THAT THE STATE COMES UP WITH
24 IS GOING TO SATISFY ALL THE PARTIES AND THIS COURT.

25 **JUDGE KARLTON:** IT MAY NOT SATISFY IT.

1 **MR. MELLO:** RIGHT.

2 **JUDGE KARLTON:** MAY NOT SATISFY IT. BUT, CERTAINLY,
3 AS A FIRST STEP IT WOULD APPEAR TO, AT LEAST ARGUABLY, BE
4 CONSISTENT WITH THE UNDERLYING NOTIONS OF THE PLRA; THAT THIS
5 IS A STATE PROBLEM AND THE FEDERAL GOVERNMENT ONLY COMES IN
6 WHEN IT'S SO DESPERATE THAT -- AND THE STATE'S MANIFESTED AN
7 INCAPACITY TO ADDRESS THE PROBLEM. SEE WHAT I'M SAYING?

8 **MR. MELLO:** I UNDERSTAND WHAT YOU ARE SAYING. BUT I
9 THINK THE COURT WOULD HAVE TO GIVE THE STATE SOME GUIDANCE.
10 EVEN IF IT WAS TIME PARAMETERS, COME UP WITH A PLAN BY "X"
11 DATE. YOU HAVE TO HAVE A PLAN TO REDUCE YOUR POPULATION.

12 I WOULD THINK IT WOULD HAVE TO SAY BY "X" AMOUNT OVER
13 "X" PERIOD OF TIME. I DON'T THINK YOU CAN SAY, GET TO A
14 POPULATION THAT GETS YOU CONSTITUTIONAL.

15 BUT I UNDERSTAND YOUR QUESTION.

16 **JUDGE KARLTON:** NO, NO. IS THERE SOMETHING IN THE
17 STATUTE WHICH SUPPORTS YOUR FEELING? I MEAN -- NEVER MIND WHAT
18 I HAD. IS THERE SOMETHING IN THE STATUTE WHICH SUPPORTS YOUR
19 FEELING?

20 **MR. MELLO:** NO. I THINK THE PRISON LITIGATION REFORM
21 ACT AND THE DEFINITION OF A PRISONER RELEASE ORDER CONTEMPLATES
22 EITHER CAPPING THE PRISONS OR RELEASING PRISONERS, RIGHT?

23 **JUDGE KARLTON:** NO, BUT PART OF THE PROBLEM WITH THE
24 PLRA IS THE EXTRAORDINARY BREADTH OF ORDERS WHICH ARE DESCRIBED
25 AS PRISONER RELEASE ORDERS.

1 THAT'S PART OF -- NOT PART OF THE PROBLEM, BUT PART
2 OF THE REALITY. SO THAT -- AS AN EXAMPLE, ONE THING THAT
3 ARGUABLY WE COULD DO, I'M NOT SUGGESTING WE WOULD, IS SAY YOU
4 CAN'T SEND ANYMORE PAROLE VIOLATORS. THAT WOULD BE A PRISON
5 RELEASE ORDER -- A PRISONER.

6 **MR. MELLO:** IF YOU ISSUED THAT ORDER, YES.

7 **JUDGE KARLTON:** YEAH. NOW, THAT WOULDN'T SET ANY
8 NUMBER. IT WOULD JUST SAY, YOU CAN'T DO THAT. AND THAT WOULD
9 CLEARLY BE -- CLEARLY, I DIDN'T MEAN THAT.

10 THAT WOULD BE APPARENTLY AUTHORIZED BY THE STATUTE
11 AND IT WOULDN'T INVOLVE ANY NUMBER IN PARTICULAR.

12 **MR. MELLO:** YOU'RE RIGHT. I DON'T DISAGREE WITH YOU.

13 IF YOU READ THE STATUTE, IT SAYS THE PRISONER RELEASE
14 ORDER IS BASICALLY ANY ORDER THAT HAS THE PURPOSE OR EFFECT OF
15 REDUCING OR LIMITING THE PRISON POPULATION.

16 **JUDGE KARLTON:** SURE.

17 **MR. MELLO:** AND THAT WOULD HAVE THAT EFFECT. AND
18 YOU'RE RIGHT THAT IT WOULDN'T NECESSARILY SAY, YOU HAVE TO
19 REDUCE YOUR POPULATION BY 52,000 OVER TWO YEARS. IT WOULD JUST
20 SAY, YOU CAN'T ADMIT. THAT WOULD BE A PRISONER RELEASE ORDER.

21 **JUDGE KARLTON:** ARE WE IN A PLACE OF BUSINESS -- I
22 DON'T KNOW WHETHER WE ARE -- WHERE YOU WOULD AGREE THAT IF WE
23 GOT TO THAT PLACE, THE COURT, BECAUSE OF THE ODD NATURE OF --
24 ODD.

25 THE COURT, BECAUSE OF THE NATURE OF THE STATUTE,

1 WOULD BE FREE TO TELL THE STATE, YOU'VE GOT TO REDUCE THE
2 POPULATION. HOW MANY, AND WHAT IS AT LEAST INITIALLY,
3 INITIALLY, YOUR RESPONSIBILITY. COME BACK IN THREE MONTHS, SIX
4 MONTHS, WHATEVER IT WOULD TAKE, AND TELL US HOW YOU ARE GOING
5 TO DO IT.

6 THEY WANT ME TO SAY, AND MAKE SURE YOU TALK TO THE
7 PLAINTIFFS. AND I EXPECT THE COUNTIES AT THAT POINT WOULD SAY,
8 AND US, TOO. AND, CERTAINLY, THAT WOULD BE GOOD PUBLIC POLICY.
9 IT'S NOT CLEAR TO ME THAT THAT WOULD BE NECESSARY. BUT COULD
10 WE DO THAT?

11 **MR. MELLO:** COULD YOU MAKE AN ORDER THAT SAYS COME UP
12 WITH A PLAN IN 12 MONTHS TO REDUCE YOUR PRISON POPULATION? I
13 THREW THAT IN THERE, THE 12 MONTHS.

14 **JUDGE KARLTON:** THAT'S ALL RIGHT. I THINK IT'S MORE
15 COMPLICATED.

16 **MR. MELLO:** I DON'T THINK IT'S SOMETHING WE CAN DO IN
17 60 OR 90 DAYS, OBVIOUSLY.

18 THE QUESTION IS: COULD THIS COURT ISSUE SUCH AN
19 ORDER? YES.

20 EXCEPT THIS COURT WAS CONVENED AND THIS CASE IS ABOUT
21 THE DELIVERY OF CONSTITUTIONAL MEDICAL CARE. SO THERE HAS TO
22 BE A NEXUS BETWEEN POPULATION AND CONSTITUTIONAL CARE. AND
23 RIGHT NOW THERE IS NO NEXUS BEFORE THIS COURT. THERE IS NO
24 RELATIONSHIP OF A NUMBER AND CONSTITUTIONAL CARE.

25 **JUDGE KARLTON:** I UNDERSTAND YOU BELIEVE THAT. I

1 UNDERSTAND YOU BELIEVE THAT. AND I RESPECT THE FACT THAT YOU
2 BELIEVE THAT. I WANT YOU TO ASSUME THAT AT LEAST ONE OF THE
3 JUDGES OF THIS COURT THINKS THAT THAT'S PROBABLY NOT THE CASE.

4 **MR. MELLO:** I'M SURPRISED.

5 **JUDGE KARLTON:** THE PROBLEM CONTINUES TO BE WHAT KIND
6 OF ORDER THE COURT IS AUTHORIZED TO ISSUE, WHAT KIND OF ORDER
7 THE COURT SHOULD ISSUE.

8 AND I ASK YOU AGAIN: IN LIGHT OF WHAT SOME FOLKS
9 MIGHT THINK IS AN AMBIGUITY IN THE EVIDENCE, WHETHER THE
10 APPROPRIATE THING TO DO -- IS THAT THERE IS AN AMBIGUITY AS TO
11 THE NUMBER. SOME FOLKS MIGHT THINK THAT. BUT THERE IS NO
12 AMBIGUITY AS TO THE REALITY THAT OVERCROWDING IS A PRIMARY
13 CAUSE.

14 AT THAT POINT THE QUESTION BECOMES -- TO ME, BECOMES
15 WHO OUGHT TO SOLVE THE PROBLEM, THE PLAINTIFFS, THE COUNTIES OR
16 THE STATE? AT LEAST TAKE AN INITIAL COUNT. AND IT SEEMS TO ME
17 IF YOU AGREE WITH ME THAT THE COURT COULD ISSUE SUCH AN ORDER,
18 THAT I THINK CREATES A POSSIBILITY THAT MAYBE MORE CONSISTENT
19 WITH THE NOTIONS THAT UNDERLIE THE ADOPTION OF THE PLRA.

20 ALL RIGHT. I'M SORRY. I'M THINKING OUT LOUD NOW.
21 GO AHEAD.

22 **JUDGE REINHARDT:** THERE IS NO QUESTION.

23 **JUDGE KARLTON:** THERE IS NO QUESTION, YOU'RE RIGHT.

24 **JUDGE REINHARDT:** PROCEED.

25 **MR. MELLO:** SO, AGAIN -- AND I WILL LEAVE IT BECAUSE

1 CLEARLY AT LEAST ONE OF THE JUDGES OF THIS THREE-JUDGE PANEL
2 DISAGREES WITH ME, BUT I BELIEVE THERE IS NO EVIDENCE THAT SAYS
3 WHAT THE NUMBER IS. AND I DON'T BELIEVE THERE IS ANY EVIDENCE
4 AS TO WHAT THE NUMBER IS OF ANY INSTITUTION EITHER.

5 AND I BELIEVE THAT PLAINTIFFS HAVE TO SHOW BY CLEAR
6 AND CONVINCING EVIDENCE WHAT THE NUMBER HAD TO BE TO PROVIDE
7 CONSTITUTIONAL CARE AND WHAT THE NUMBER HAD TO BE AT EACH
8 INSTITUTION.

9 BUT EVEN IF WE LEAVE THAT ASIDE AND GO TO THE SECOND
10 HALF, LET'S ASSUME PLAINTIFFS HAVE MET THEIR BURDEN OF CLEAR
11 AND CONVINCING EVIDENCE, PRIMARY CAUSE, ONLY FIX. THEN THIS
12 COURT HAS TO GIVE SUBSTANTIAL WEIGHT TO THE ADVERSE IMPACT ON
13 PUBLIC SAFETY.

14 AND THE ONLY NUMBER THAT WE ARE LEFT TO ANALYZE WHEN
15 MAKING THAT IS THE NUMBER PROPOSED BY PLAINTIFFS, WHICH IS THE
16 RELEASE OF 52,000 OVER TWO YEARS. AND RELEASE BEING THE
17 REDUCTION IN THE PRISON POPULATION.

18 **JUDGE REINHARDT:** WE ARE NOT BOUND BY WHAT THE
19 PARTIES WANT. ONCE YOU DECIDE THAT THERE IS A VIOLATION, THAT
20 THE OVERCROWDING IS A PRIMARY CAUSE, AT THAT POINT IT'S UP TO
21 THE COURT TO FASHION A REMEDY WITH THE ASSISTANCE OF THE
22 PARTIES. AND MAYBE, AS JUDGE KARLTON SUGGESTS, ASKING THE
23 STATE FIRST WHAT IT WANTS TO DO TO SOLVING THE PROBLEM.

24 BUT, YOU KNOW, THE IDEA THAT THE 52,000 REDUCTION IN
25 THE POPULATION WILL OCCUR OVER A TWO-YEAR PERIOD IS SIMPLY A

1 PROPOSAL FROM THE PLAINTIFFS.

2 **MR. MELLO:** UNDERSTOOD. I WASN'T SUGGESTING
3 OTHERWISE.

4 ALL I WAS SUGGESTING IS THAT THE ONLY WAY THAT WE CAN
5 ANALYZE THE EVIDENCE IN THE CASE IS HINGED TO THAT 52,000
6 NUMBER. RIGHT.

7 THAT WAS THE NUMBER THAT PLAINTIFFS' OWN EXPERTS
8 TESTIFIED ABOUT. MR. AUSTIN, AND HE TESTIFIED ABOUT HOW YOU
9 WOULD GET THERE TO 52,000 OVER TWO YEARS. SO THAT'S THE REASON
10 I WAS REFERENCING IT.

11 **JUDGE REINHARDT:** BUT THE PROBLEM IS I THINK WHAT
12 JUDGE KARLTON SUGGESTED, IS THE STATE SHOULD BE ASKED TO TELL
13 US HOW IT WOULD GET THERE, NOT THAT THEY ARE BOUND BY
14 MR. AUSTIN'S VIEW.

15 **JUDGE KARLTON:** OR, ALTERNATIVELY, WE FIND OURSELVES
16 IN THE SITUATION IN WHICH THE BEST EVIDENCE IS THE 52,000, AND
17 WE TELL THE STATE THAT APPEARS TO BE THE CASE, WE ARE OPEN TO
18 THE STATE TELLING US WHAT THE ALTERNATIVES ARE IN THE REAL
19 WORLD. AND THAT HAS THE APPEAL OF -- WELL -- OKAY.

20 **MR. MELLO:** SO THEN THE BURDEN GETS TRANSFERRED TO
21 DEFENDANTS TO PROVE UP PLAINTIFFS' CASE AS TO WHAT THAT NUMBER
22 IS THAT'S REQUIRED FOR CONSTITUTIONAL CARE. AND I BELIEVE THAT
23 FLIES IN THE VERY FACE OF THE PRISONER LITIGATION REFORM ACT.

24 **JUDGE HENDERSON:** WHAT IF INSTEAD OF THAT WE ARE
25 GOING TO MAKE FINDINGS OF FACT? WHAT IF WE SAY -- WE TAKE INTO

1 ACCOUNT ALL OF THE EVIDENCE AND WE FIND MAYBE TWO TO ONE,
2 WHATEVER, WE FIND THAT 135 PERCENT IS THE NUMBER NECESSARY.
3 YOU KNOW, YOU WILL APPEAL IT, BUT BEYOND THAT, WOULD THAT DO IT
4 TO GET US MOVING FORWARD?

5 **MR. MELLO:** I THINK IT WOULD HAVE TO BE BASED UPON
6 THE RECORD IN THE CASE. AND I UNDERSTAND HOW THE COURT COULD
7 THINK ABOUT CRAFTING SUCH AN ORDER, BUT I THINK IT WOULD -- I
8 WOULD QUESTION WHERE THE COURT WOULD GET TO THAT 135 PERCENT?

9 BECAUSE WHAT YOU'VE HEARD IS, YOU KNOW, REPORTS AND
10 EXPERT PANEL REPORTS THAT WERE DONE WITH RESPECT TO PROGRAMMING
11 AND NOT WITH RESPECT --

12 **JUDGE KARLTON:** FACINORI. FACINORI. IF YOU CAN'T
13 DELIVER A PROGRAM BECAUSE OF OVERCROWDING. AND WE HAVE SO MUCH
14 EVIDENCE ABOUT BEING UNABLE TO DELIVER MENTAL HEALTH CARE
15 BECAUSE THERE AREN'T ENOUGH BEDS, THERE AREN'T ENOUGH
16 PSYCHIATRISTS, THERE AREN'T ENOUGH OF ALL OF THESE THINGS, IT
17 FOLLOWS THAT IF 135 PERCENT IS NECESSARY FOR DELIVERY OF
18 PROGRAMS, IT IS THE MINIMUM NECESSARY FOR AT LEAST MENTAL
19 HEALTH CARE, AND I WOULD ASSUME PHYSICAL AS WELL, AND MAYBE
20 IT'S LESS THAN THAT. THERE ARE SOME OF US WHO SUSPECT IT IS.

21 BUT, I MEAN, IF THAT'S THE BEST EVIDENCE THAT WE'VE
22 GOT, THAT'S THE BEST EVIDENCE WE'VE GOT.

23 **MR. MELLO:** AND I UNDERSTAND. I JUST DON'T BELIEVE
24 THAT THAT EVIDENCE IS, FRANKLY, VERY COMPELLING. PROGRAMMING
25 IS QUITE DIFFERENT THAN MEDICAL CARE. AND I CAN'T SPEAK TO THE

1 COLEMAN ISSUES AND I WON'T EVEN TRY TO, BUT LET ME SPEAK TO THE
2 PLATA ISSUES.

3 THE DELIVERY OF MEDICAL CARE IN PLATA HAS
4 UNDOUBTEDLY -- THERE IS NO DISPUTE THAT IT'S IMPROVED
5 DRAMATICALLY SINCE 2006. THERE IS SIMPLY NO DISPUTE THAT IT'S
6 IMPROVED DRAMATICALLY.

7 AND WHY HAS IT IMPROVED? BECAUSE WE HAVE MORE
8 DOCTORS, MORE NURSES, MORE PHARMACY SERVICES, BETTER. THAT
9 IT'S IMPROVING. THERE IS NO DISPUTE THERE.

10 SO THEN HOW DO WE COME UP WITH A NUMBER, AND IS THAT
11 NUMBER -- THOSE IMPROVEMENTS HAVE OCCURRED IN THE VERY FACE OF
12 POPULATION PRESSURES. THOSE IMPROVEMENTS HAVE OCCURRED.

13 SO HOW COULD WE SAY THAT 135 PERCENT HAS ANY
14 RELEVANCE WHEN THE IMPROVEMENTS HAVE OCCURRED, THE DRAMATIC
15 IMPROVEMENTS HAVE OCCURRED IN THE FACE OF POPULATION PRESSURES?
16 THAT WOULD BE NUMBER ONE.

17 BUT I GUESS I WOULD LIKE TO GET TO THE SECOND HALF OF
18 THE ANALYSIS, IF I MAY, UNLESS THE COURT HAS MORE QUESTIONS.

19 **JUDGE REINHARDT:** I HAVE ONE MORE QUESTION.

20 **MR. MELLO:** SURE.

21 **JUDGE REINHARDT:** WHICH IS, YOU SEEM TO BELIEVE THAT
22 THE REMEDY MUST BE DEVELOPED BY CLEAR AND CONVINCING EVIDENCE.

23 **MR. MELLO:** NO, I DON'T BELIEVE SO.

24 **JUDGE REINHARDT:** OKAY.

25 **JUDGE KARLTON:** OKAY.

1 **MR. MELLO:** I BELIEVE THAT PLAINTIFFS HAVE TO MEET
2 THEIR BURDENS OF PRIMARY CAUSE AND ONLY RELIEF BY CLEAR AND
3 CONVINCING EVIDENCE. BUT I HAVE NOT SUGGESTED IT, NOR DO I
4 BELIEVE THAT THE PLRA PROVIDES THAT.

5 **JUDGE REINHARDT:** ALL RIGHT. NOW, YOUR NEXT POINT.

6 **MR. MELLO:** WELL, I WAS GOING TO GO TO -- AGAIN,
7 WE'RE STUCK WITH THE 52,000 BECAUSE THAT'S WHAT THE EXPERTS AND
8 DEFENDANT INTERVENORS RELIED UPON WHEN THEY CAME UP WITH THEIR
9 ANALYSIS OF THE ADVERSE IMPACTS OF PUBLIC SAFETY.

10 AND I THINK WE NEED TO SPEAK TO THAT NUMBER ONLY
11 BECAUSE THAT'S WHAT THE EXPERTS RELIED UPON IN COMING UP WITH
12 THAT. AND THEY GOT TO THAT 52,000 -- LET'S JUST FOCUS ON
13 DR. AUSTIN, OKAY, PLAINTIFFS' EXPERT.

14 DR. AUSTIN SAID TO GET TO 52,000 IN TWO YEARS, THAT
15 YOU CANNOT ACHIEVE A 52,000 REDUCTION IN TWO YEARS UNLESS YOU
16 APPLIED SHORTENED LENGTH OF SENTENCE TO TWO STRIKERS AND
17 LIFERS.

18 **JUDGE KARLTON:** THIS IS IMPORTANT. IT'S ALL
19 IMPORTANT.

20 I HAD UNDERSTOOD HIM TO SAY THAT THAT WOULD MAKE IT
21 EASIER AND MORE SIMPLE. I DIDN'T THINK HE SAID THAT IT WAS
22 NECESSARY. I THOUGHT --

23 **MR. MELLO:** NO. AND WE CITED TO IT IN OUR PROPOSED
24 FINDINGS OF FACT AND CONCLUSIONS OF LAW, I BELIEVE, THAT HE
25 SPECIFICALLY SAID YOU CANNOT GET TO 52,000 IN TWO YEARS UNLESS

1 YOU DO LIFERS AND SECOND STRIKERS. PERIOD. THAT'S THEIR
2 EXPERTS.

3 **JUDGE REINHARDT:** WHAT I DON'T UNDERSTAND ABOUT THIS
4 ARGUMENT IS WHY YOU THINK WE ARE BOUND JUST BECAUSE THE
5 PLAINTIFFS SAID TWO YEARS.

6 IF WE AGREED, SAY, OKAY, DO IT IN THREE YEARS, WE
7 DON'T HAVE TO ARGUE THIS CASE IN TERMS OF WHAT THE PLAINTIFFS
8 OR THEIR EXPERTS SAY.

9 I MEAN, LET'S ASSUME WE WANT TO REDUCE IT BY 52,000.
10 I'M NOT SUGGESTING THAT WE DO, BUT LET'S ASSUME WE DID. WHY DO
11 WE ONLY LOOK AT WHAT THE EFFECT WOULD BE IN TWO YEARS INSTEAD
12 OF LOOKING AT THE EFFECT IN THREE YEARS ALSO?

13 **MR. MELLO:** BECAUSE THE COURT HAS ANALYZED THE
14 ADVERSE IMPACT ON PUBLIC SAFETY AND THE EVIDENCE WITH RESPECT
15 TO THAT WAS BASED UPON THE 52,000-FIGURE. THERE IS NO EVIDENCE
16 AS TO WHAT IT WOULD BE IF YOU CHOSE A FOUR-YEAR PLAN, A
17 FIVE-YEAR PLAN.

18 **JUDGE KARLTON:** CLEARLY, EVERY TIME THAT WE EXTEND
19 THE PERIOD OF TIME, IT'S FEWER PEOPLE BEING SUBJECT TO RELEASE.

20 **MR. MELLO:** YES.

21 **JUDGE KARLTON:** SO THAT IF THERE IS ANY ENDANGERMENT
22 OF PUBLIC SAFETY, AND THERE ARE PLENTY OF EXPERTS WHO TESTIFIED
23 THERE WOULDN'T BE, BUT IF THERE WERE, IT WOULD BE REDUCED BY
24 THE NUMBER OF PEOPLE. IT WOULD BE REDUCED IF WE EXTENDED IT A
25 YEAR. RIGHT?

1 **MR. MELLO:** CORRECT. IT WOULD BE SOMETHING LESS.
2 THE FIRST IMPACT WOULD BE LESS --

3 **JUDGE KARLTON:** SO JUDGE REINHARDT'S QUESTION, WHICH
4 IS, WHY DO WE CARE? YOU KNOW, WE RESPECT THE PLAINTIFFS, BUT
5 LIKE ALL PLAINTIFFS, THEY ARE OVERREACHING. I DIDN'T SAY THAT.

6 YOU KNOW, WHY WOULD WE FEEL COMPELLED TO SAY IT'S
7 EITHER TWO YEARS OR NOTHING?

8 **MR. MELLO:** WELL, I DON'T THINK THIS COURT WOULD BE
9 COMPELLED, BUT I THINK THE EVIDENCE BEFORE THE COURT IS THAT
10 THERE WOULD BE A SUBSTANTIAL IMPACT ON PUBLIC SAFETY.

11 I THINK THAT THE EVIDENCE WAS MISCHARACTERIZED
12 EARLIER TODAY WITH RESPECT TO THE ADVERSE IMPACT ON PUBLIC
13 SAFETY.

14 I BELIEVE THAT THE EVIDENCE FROM DR. AUSTIN WAS THAT
15 IF YOU SHORTEN SENTENCES BY -- USE THE SHORTENED -- SHORTEN THE
16 LENGTH OF SENTENCE APPROACH TO HELP REDUCE YOUR POPULATION,
17 THAT IN L.A. COUNTY ALONE THERE WOULD BE 1398 ARRESTS IN THE
18 FIRST FOUR MONTHS OF IMPLEMENTATION.

19 I THINK THE EVIDENCE IS THAT AS PART OF A POPULATION
20 REDUCTION STRATEGY AS PROPOSED BY PLAINTIFFS, WHICH THEY CLAIM
21 WILL NOT HAVE AN ADVERSE IMPACT ON PUBLIC SAFETY, THAT IN THE
22 FIRST YEAR OF THE PROPOSAL YOU WOULD HAVE A REDUCTION IN
23 CALIFORNIA'S PRISON POPULATION BY 12,000 INMATES, BUT AT THE
24 SAME TIME YOU WOULD HAVE 10,400 OF THEM REARRESTED.

25 SO YOU WOULD HAVE A 1700 PERSON DELTA. THAT'S WHAT

1 DR. AUSTIN TESTIFIED ABOUT.

2 **JUDGE REINHARDT:** I'M INTERESTED IN EXPLORING
3 VARIOUS METHODS OF GETTING THROUGH A REDUCTION. I MEAN, THE
4 GOVERNOR HAS PROPOSED SO. HE SAYS YOU ELIMINATE PAROLE FOR A
5 NUMBER OF --

6 **JUDGE KARLTON:** THIRTY THOUSAND.

7 **JUDGE REINHARDT:** WHATEVER IT IS. HE WANTS TO
8 ELIMINATE PAROLE, WHICH SHOULD HAVE THE EFFECT OF REDUCING THE
9 PRISON POPULATION, FOR WHOMEVER HE WANTED.

10 HE WANTS TO CHANGE THE AMOUNTS FOR WHAT IS FELONY
11 THEFT, WHICH WOULD ALSO BE -- I DON'T SEE WHY WE ARE STUCK WITH
12 WHAT THE PLAINTIFFS' EXPERTS HAVE SUGGESTED.

13 I WOULD BE INTERESTED IN KNOWING WHAT THE GOVERNOR'S
14 POSITION, THE STATE'S POSITION IS ON METHODS YOU CAN USE TO
15 REDUCE THE PRISON POPULATION.

16 **JUDGE KARLTON:** WE KNOW THAT THE GOVERNOR HAS
17 PROPOSED IN HIS BUDGET 30,000 FOLKS WHO ARE GOING TO BE
18 RELEASED WITHOUT -- AS I UNDERSTAND, MAYBE I DON'T -- WITHOUT
19 PAROLE.

20 NOW, AS YOU STAND HERE TODAY, ARE YOU PREPARED TO SAY
21 THAT THAT'S NOT THE GOVERNOR'S POSITION; I'M HIS LAWYER AND I
22 WILL TELL YOU WHAT HIS POSITION IS?

23 **MR. MELLO:** NO. I'M PREPARED TO SAY THAT THE
24 GOVERNOR'S BUDGET PROPOSAL IS THE GOVERNOR'S BUDGET PROPOSAL
25 AND IT SAYS WHAT IT IS. AND IT'S A BUDGET PROPOSAL IN HARSH

1 ECONOMIC TIMES AND IT INCLUDES MANY CHOICES TO REDUCE SPENDING
2 THAT THE GOVERNOR WOULD NOT OTHERWISE MAKE IN A PERFECT WORLD.

3 **JUDGE KARLTON:** IF THIS WERE A PERFECT WORLD, WE
4 WOULDN'T BE HERE.

5 **JUDGE REINHARDT:** WE HAVE TO DEAL WITH THE FACT THAT
6 WE ARE IN AN ECONOMIC CRISIS.

7 **MR. MELLO:** RIGHT.

8 **JUDGE REINHARDT:** ALL OF US. SO WE MIGHT HAVE BETTER
9 WAYS TO REDUCE THE PRISON POPULATION IF THE STATE HAD THE MONEY
10 TO DO IT, BUT THEY DON'T. AND WE HAVE TO DEAL WITH THE WORLD
11 THAT WE ARE IN, THE SAME WORLD THE GOVERNOR IS IN.

12 **MR. MELLO:** RIGHT. AND THAT'S WHY I THINK IT'S
13 IMPORTANT TO ANALYZE THE EVIDENCE WITH RESPECT TO THE ADVERSE
14 IMPACT ON PUBLIC SAFETY. THIS COURT CANNOT ASSUME ANYTHING BUT
15 THE STATUS QUO WITH RESPECT TO THE EARLY RELEASE OR REDUCTION
16 IN THE PRISON POPULATION.

17 **JUDGE KARLTON:** I DON'T UNDERSTAND. I DON'T KNOW
18 WHETHER TO SAY IT'S THE GOVERNOR'S POSITION OR WHOSE POSITION
19 IT IS. THE GOVERNOR HAS TOLD THE LEGISLATURE, IN EFFECT, WE
20 CAN RELEASE 30,000 PEOPLE WITHOUT ENDANGERING PUBLIC SAFETY.

21 MY QUESTION TO YOU, AND I THOUGHT IT WAS
22 JUDGE REINHARDT'S QUESTION TO YOU: ARE YOU BOUND BY THAT? DO
23 YOU AGREE THAT AT LEAST FOR 30,000 PEOPLE, OR WHATEVER THE
24 NUMBER IS --

25 **MR. MELLO:** YEAH, I'M NOT SURE THAT'S THE PROPOSAL I

1 KNOW OF.

2 **JUDGE KARLTON:** WELL, WHATEVER THE NUMBER IS, THAT
3 THOSE PEOPLE CAN BE RELEASED WITHOUT ANY DANGER TO PUBLIC
4 SAFETY, ENDANGERMENT OF PUBLIC SAFETY?

5 **MR. MELLO:** WHAT I THINK I WAS TRYING TO SAY IS THE
6 GOVERNOR HAS MADE A BUDGET PROPOSAL, OKAY. HE'S MADE A
7 PROPOSAL THAT REQUIRES TOUGH DECISIONS, DECISIONS HE WOULDN'T
8 WANT --

9 **JUDGE REINHARDT:** THAT'S --

10 **MR. MELLO:** NO, NO, NO.

11 **JUDGE REINHARDT:** WE ALSO HAVE DECISIONS WE WOULDN'T
12 WANT TO MAKE --

13 **MR. MELLO:** RIGHT. HE IS CUTTING SPENDING ON
14 SCHOOLS. HE'S CONTEMPLATING THINGS HE WOULDN'T OTHERWISE DO,
15 LIKE THIS VERY BUDGET.

16 **JUDGE KARLTON:** MR. MELLO. MR. MELLO. MY QUESTION
17 IS MUCH NARROWER. I'M TRYING TO FIND OUT WHETHER OR NOT IT IS
18 THE STATE'S POSITION, WHATEVER YOUR PERSONAL VIEWS ARE AND,
19 INDEED, WHATEVER THE ATTORNEY GENERAL'S PERSONAL VIEWS ARE,
20 THAT IT IS THE STATE'S POSITION THAT "X" NUMBER, WHATEVER THAT
21 NUMBER IS, AS PROPOSED IN THE BUDGET PROPOSAL CAN BE RELEASED
22 WITHOUT ANY ENDANGERMENT OF PUBLIC SAFETY.

23 **MR. MELLO:** I GUESS MY ANSWER TO YOU WOULD BE THAT
24 THE BUDGET PROPOSALS ARE THE BUDGET PROPOSALS. I DON'T KNOW
25 WHICH ONE YOU'RE REFERRING TO. IF YOU'RE REFERRING TO '08-'09,

1 '09-'10. I DON'T KNOW WHAT YOU'RE REFERRING TO.

2 IF YOU ARE REFERRING TO THE MOST RECENT ONE THAT WE
3 SUBMITTED BRIEFING ON, I BELIEVE OUR POSITION IS CLEAR. AND IT
4 SAYS, HERE IS THE BUDGET PROPOSAL. IT DOESN'T PROPOSE THE
5 RELEASE OF PRISONERS, THE SAVINGS THAT WE ARE BEING FORCED TO
6 TRY TO HAVE WITH RESPECT TO PAROLE.

7 **JUDGE KARLTON:** SO YOU ARE PREPARED TO SAY THAT THE
8 GOVERNOR IS PROPOSING TO THE STATE THAT WE ENDANGER PUBLIC
9 SAFETY.

10 **MR. MELLO:** NO, I'M NOT.

11 **JUDGE REINHARDT:** SO YOU WILL AGREE THAT WHATEVER THE
12 GOVERNOR PROPOSED WOULD NOT ENDANGER PUBLIC SAFETY?

13 **MR. MELLO:** HOWEVER MOTIVATED.

14 **JUDGE REINHARDT:** ARE YOU WILLING TO SAY THAT
15 WHATEVER THE GOVERNOR PROPOSED WOULD NOT ENDANGER THE PUBLIC
16 SAFETY?

17 **MR. MELLO:** I AM SURE THAT THE GOVERNOR DID NOT MAKE
18 THE PROPOSAL THAT HE THOUGHT WOULD ENDANGER PUBLIC SAFETY.
19 THAT BEING SAID --

20 **JUDGE REINHARDT:** OKAY. SO WE CAN PROCEED FROM
21 THERE, IS WHATEVER HIS PROPOSAL WAS.

22 **MR. MELLO:** WE CAN PRESUME THAT IT WAS A PROPOSAL
23 THAT WOULD BE DIFFERENT IN THE MAIN REVISE, THAT ISN'T ACTED
24 UPON UNLESS APPROVED BY THE LEGISLATURE.

25 **JUDGE REINHARDT:** I KNOW. SOMETIMES THE GOVERNOR, AS

1 YOU SAID BEFORE, WOULD LIKE THE COURT TO DO WHAT THEY AREN'T
2 ABLE TO DO THEMSELVES. THAT'S ALL CLEAR. IT DOESN'T MATTER.

3 WE ARE TRYING TO FIND OUT -- I DON'T KNOW WHO THE
4 STATE IS, BUT THE GOVERNOR IS THE DEFENDANT IN THIS CASE AND
5 YOU ARE THE GOVERNOR'S LAWYER, I ASSUME.

6 **JUDGE KARLTON:** APPARENTLY.

7 **JUDGE REINHARDT:** AND I ASSUME YOU WERE GOING TO TAKE
8 THE SAME POSITION THAT THE GOVERNOR IS TAKING. AND THE
9 GOVERNOR, AS I UNDERSTAND IT, HAS TOLD THE LEGISLATURE AND THE
10 PUBLIC THAT CERTAIN ACTIONS WILL NOT ENDANGER THE PUBLIC
11 SAFETY.

12 **MR. MELLO:** I DON'T BELIEVE THE -- WELL, I BELIEVE I
13 HAVE ANSWERED YOUR QUESTION. I DON'T BELIEVE THE GOVERNOR
14 WOULD PROPOSE SOMETHING THAT HE THOUGHT WOULD ENDANGER PUBLIC
15 SAFETY. SO I BELIEVE I HAVE ANSWERED THAT QUESTION.

16 **JUDGE REINHARDT:** WHAT IS THE GOVERNOR'S PROPOSAL?
17 HOW MANY PEOPLE WOULD -- YOU KNOW WHAT A PRISONER RELEASE ORDER
18 IS. I'M NOT SAYING HE SAID OPEN THE GATE TO THE PRISONS. I'M
19 SAYING, HOW MANY PEOPLE?

20 **MR. MELLO:** YOUR HONORS, WE SUBMITTED BRIEFING
21 REGARDING THE BUDGET PROPOSAL. IT SAYS WHAT IT SAYS. IT SAYS
22 THAT THE SAVINGS ARE GOING TO BE ACHIEVED PRIMARILY BY REDUCING
23 THE NUMBER OF INDIVIDUALS WHO ARE ON PAROLE SUPERVISION.
24 THAT'S WHAT IT SAYS. IT DOESN'T SAY RELEASE PRISONERS.

25 **JUDGE REINHARDT:** I KNOW THAT. I JUST SAID IT

1 DOESN'T SAY RELEASE PRISONERS. TO WHAT EXTENT WOULD THIS
2 REDUCE THE PRISON POPULATION?

3 NOBODY IS SUGGESTING RELEASING PRISONERS, JUST
4 OPENING THE DOORS. WHAT WE ARE TRYING TO FIND OUT, THE PRISON
5 RELEASE ORDER IS REDUCING THE POPULATION, AND TO WHAT EXTENT
6 WOULD THE GOVERNOR'S PROPOSAL REDUCE THE PRISON POPULATION?

7 **MR. MELLO:** I DON'T BELIEVE THAT THE GOVERNOR'S
8 PROPOSAL IN THE '09-'10 BUDGET -- AGAIN, IT WAS PRIMARILY WITH
9 RESPECT TO LESS PAROLE SUPERVISION; YOU KNOW, SOME PEOPLE NOT
10 HAVING PAROLE SUPERVISION, SHORTER SUPERVISION.

11 **JUDGE REINHARDT:** THEREFORE, WE WOULDN'T HAVE
12 PAROLEES RETURNING TO PRISONS.

13 **MR. MELLO:** PRESUMABLY, THOSE PAROLEES, AS WE HEARD
14 TESTIMONY FROM AT THE TIME OF TRIAL, ARE THE PEOPLE WHO ARE
15 LEAST LIKELY TO REOFFEND AND LEAST LIKELY TO RETURN TO PRISON.
16 SO, THEREFORE, IT'S GOING TO HAVE THE LEAST IMPACT ON THE
17 PRISON POPULATION.

18 **JUDGE KARLTON:** NOW, MR. MELLO, I THINK WE HAVE
19 REALLY EXHAUSTED THIS. YOU'RE UNABLE OR UNWILLING TO RESPOND.

20 THIS GOES BACK IN A SENSE TO THE OTHER ISSUE, WHICH
21 IS LETTING THE STATE TELL US WHAT WOULD BE APPROPRIATE. THE
22 GOVERNOR MADE A PROPOSAL. WITHIN THE MEANING OF THE PLRA IT IS
23 CLEARLY A PRISONER RELEASE ORDER.

24 **MR. MELLO:** ISSUED BY THIS COURT AS OPPOSED TO IF THE
25 GOVERNOR UNDER HIS AUTHORITY IS THE CHIEF EXECUTIVE OF

1 CALIFORNIA DID IT ON HIS OWN THROUGH ENACTMENT BY THE
2 LEGISLATURE.

3 **JUDGE KARLTON:** SO THE QUESTION THEN BECOMES -- ONE
4 HOPES AND EXPECTS THAT THE GOVERNOR WOULD NOT PROPOSE SOMETHING
5 WHICH HE THOUGHT WOULD INCREASE PUBLIC -- ENDANGER PUBLIC
6 SAFETY.

7 IF WE SAY, LOOK, STATE, TELL US WHAT TO DO. THERE IS
8 SORT OF, SO TO SPEAK, A BOTTOM LINE, WHICH IS THERE IS AT LEAST
9 THIS NUMBER OF PEOPLE -- MAYBE IT'S NOT SUFFICIENT. I DON'T
10 KNOW. BUT AT LEAST THIS NUMBER OF PEOPLE THAT YOU DON'T HAVE
11 TO WORRY ABOUT, JUDGES. THAT WILL NOT ENDANGER PUBLIC SAFETY.
12 MAYBE EVERYTHING ELSE WILL, THAT WON'T. BUT IT WOULD AT LEAST
13 START WITH THE STATE TELLING US WHAT THE STATE BELIEVES CAN BE
14 DONE.

15 I'M NOT -- I THINK WE'VE EXHAUSTED THIS AND THERE'S
16 PROBABLY NO POINT IN PROCEEDING.

17 **MR. MELLO:** AND I FEAR I WILL REPEAT MYSELF, TOO.
18 IF YOU HAVE ANYTHING ELSE?

19 **JUDGE REINHARDT:** MAYBE SOME LATER TIME IN THESE
20 PROCEEDINGS WE ARE GOING TO ASK YOU TO GO TO THE GOVERNOR AND
21 FIND OUT WHAT HIS PROPOSAL IS TO RELIEVE THE PRISON POPULATION.
22 YOU DON'T HAVE TO DO IT TODAY. IT MAY COME LATER.

23 **MR. MELLO:** I THINK YOU'VE HEARD EVIDENCE AS TO WHAT
24 THE GOVERNOR'S PROPOSAL IS ON THAT: TRANSFERRING PRISONERS OUT
25 OF STATE, HOPEFULLY IMPLEMENTING AB900, AND OTHER THINGS. I

1 BELIEVE YOU'VE HEARD THE PROPOSALS ON THAT.

2 **JUDGE REINHARDT:** I SUGGEST LATER, IF THERE HAPPENS
3 TO BE A CAP PUT ON THE PRISONS, YOU WILL BE ABLE TO COME BACK
4 AND TELL US --

5 **MR. MELLO:** WHAT THE NUMBER IS.

6 **JUDGE REINHARDT:** WELL, MAYBE WHAT THE NUMBER IS OR
7 MAYBE HOW YOU'RE GOING TO GET THAT CAP.

8 WE'LL NOT BE BUILDING PRISONS. IF HE IS GOING TO
9 TELL US BUILD PRISONS, ASK HIM IF HE IS GOT THE MONEY TO BUILD
10 PRISONS.

11 **MR. MELLO:** I MEAN, THERE ARE MANY OTHER THINGS I
12 WOULD LIKE TO DISCUSS. I BELIEVE THEY WERE IN THE FINDINGS OF
13 FACT AND CONCLUSIONS OF LAW, BUT I WILL GLADLY HAND OVER THE
14 MICROPHONE TO MISS TILLMAN.

15 **JUDGE REINHARDT:** IF YOU WOULD LIKE TO DISCUSS OTHER
16 THINGS, THAT'S WHAT I WOULD DO.

17 **MR. MELLO:** WELL, I THINK THIS COURT HAS SAID THAT IT
18 DOESN'T WANT TO HEAR ME TALK ABOUT THE ANALYSIS OF THE 52,000
19 PRISONER REDUCTION BY PLAINTIFFS AND THE ADVERSE IMPACT ON
20 PUBLIC SAFETY. AND I BELIEVE THAT --

21 **JUDGE REINHARDT:** JUST A MINUTE, MR. MELLO. WE
22 DIDN'T SAY YOU COULDN'T DISCUSS THAT.

23 WE POINTED OUT TO YOU, HOWEVER, THAT THAT'S NOT THE
24 ONLY POSSIBLE PROBLEM. YOU SHOULD CONSIDER, ALSO, NOT THAT
25 THERE ARE 52,000 REDUCTION IN TWO YEARS. YOU SHOULD ALSO THINK

1 ABOUT THE FACT THAT IT MIGHT BE A 40,000 REDUCTION IN THREE
2 YEARS, FOR EXAMPLE.

3 WE DON'T KNOW WHAT IT WOULD BE, BUT WE ONLY TALKED
4 ABOUT THE FACT OF A 52,000 REDUCTION IN TWO YEARS BECAUSE
5 THAT'S WHAT THE PLAINTIFF SAYS.

6 **MR. MELLO:** I THINK WE NEED --

7 **JUDGE REINHARDT:** WE HAVE TO LOOK AT THE EFFECT ON
8 PUBLIC SAFETY.

9 **MR. MELLO:** RIGHT.

10 **JUDGE REINHARDT:** ONE OF THE PROBLEMS IS WE DON'T
11 KNOW WHAT NATURE OF THE PRISONER RELEASE ORDER IS. WE DON'T
12 KNOW WHAT THE STATE WOULD DO TO COME INTO COMPLIANCE WITH IT.

13 AS I SAID EARLIER, IF THE STATE DECIDED WE ARE GOING
14 TO HAVE TO REDUCE THE POPULATION BY 20,000, SO WE ARE GOING TO
15 REDUCE 20,000 FIRST DEGREE MURDERERS, THEN, AS I SAY, IT MIGHT
16 HAVE SOME REAL EFFECT ON PUBLIC SAFETY.

17 IF THEY SAY WE ARE GOING TO REDUCE THE POPULATION BY
18 LETTING SOME PAROLEES GET OUT A LITTLE EARLY, THAT WOULD HAVE A
19 DIFFERENT EFFECT ON PUBLIC SAFETY.

20 IT'S NOT AN EASY PROBLEM TO RESOLVE AND WE NEED THE
21 STATE'S COOPERATION IN DEALING WITH IT.

22 **MR. MELLO:** UNDERSTOOD. I THINK, WITHOUT TALKING
23 ABOUT THE 52,000, WE SHOULD THINK A LITTLE BIT ABOUT
24 CALIFORNIA'S PRISON POPULATION THOUGH. WE DON'T INCARCERATE
25 FELONS AT AN UNUSUALLY HIGH RATE. IN FACT, WE ARE ABOUT HALF

1 THE NATIONAL AVERAGE.

2 OUR INCARCERATION RATE IS 470 PER 100,000 INMATES,
3 WHICH IS ABOUT JUST SLIGHTLY ABOVE THE NATIONAL AVERAGE OF 445.
4 WE DON'T KEEP PEOPLE IN PRISON LONGER THAN OTHER FOLKS.

5 THE INCREASE IN THE CALIFORNIA PRISON POPULATION
6 BETWEEN 1997 AND 2007 WAS ALMOST EXCLUSIVELY DUE TO AN INCREASE
7 IN THE NUMBER OF INDIVIDUALS WHO WERE CONVICTED OF CRIMES
8 AGAINST PERSON.

9 AT THE SAME TIME -- BECAUSE WE ARE TALKING ABOUT
10 PEOPLE WITHOUT RISK. AT THE SAME TIME THE NUMBER OF PEOPLE IN
11 PRISON FOR DRUG OFFENSES HAS GONE DOWN SUBSTANTIALLY, AND
12 THAT'S IN THE RECORD.

13 A HIGHER PERCENTAGE OF CALIFORNIA'S INMATES THAN IN
14 OTHER STATES HAVE 10 OR MORE ARRESTS BEFORE THEY GO TO PRISON.

15 THERE IS EVIDENCE IN THE COURT AS TO WHAT EARLY
16 RELEASE PROGRAMS DID IN LOS ANGELES COUNTY AND OTHER COUNTIES.

17 THERE IS EVIDENCE IN THE COURT OF A RELATIONSHIP
18 BETWEEN INCARCERATION RATES AND CRIME RATES. I BELIEVE THAT
19 THE RECORD WAS MISSTATED EARLIER.

20 I BELIEVE THAT THERE IS EVIDENCE IN THE RECORD THAT A
21 25 PERCENT REDUCTION IN VIOLENT CRIME THAT HAS OCCURRED IN THE
22 LAST 25 YEARS IS DUE TO INCREASED INCARCERATION, INCREASED
23 PRISON POPULATIONS, MEANING THAT INCAPACITATION HAS AN EFFECT.

24 I BELIEVE THAT THERE WAS EXPERT TESTIMONY RELIED UPON
25 BY ONE OF PLAINTIFFS' EXPERTS, JOE LEHMAN, THAT A 10 PERCENT

1 DECREASE IN THE INCARCERATION RATE LEADS TO A STATISTICALLY
2 SIGNIFICANT 3.3 INCREASE IN CRIME RATES.

3 PLAINTIFFS -- AGAIN, THEIR REQUEST FOR A 52,000
4 REDUCTION WOULD DECREASE THE CRIME RATE BY 25 PERCENT. SO IF A
5 10 PERCENT INCREASES THE CRIMINAL RATE BY 3.3 PERCENT, WHAT
6 DOES A 25 PERCENT DECREASE DO?

7 WHAT IT MEANS IS THAT THERE IS GOING TO BE MORE CRIME
8 AND THAT THERE IS GOING TO BE AN INCREASE IN THE CRIME RATE IF
9 THERE IS A PRISONER RELEASE ORDER.

10 AND THEN WE HAVE SPOKEN ABOUT DR. AUSTIN. IN FACT,
11 SECOND AND THIRD STRIKERS, AND IT'S CITED IN THE RECORD AND
12 IT'S NOT IN DISPUTE. I THINK THAT THE EVIDENCE IS -- AND I
13 WILL LEAVE IT MORE TO THE INTERVENORS -- IS THAT THEY DON'T
14 HAVE THE RESOURCES TO DEAL WITH ADDITIONAL PEOPLE WHO ARE
15 EITHER PAROLED OR DIVERTED. THEY JUST SIMPLY DON'T HAVE THE
16 RESOURCES. THE EVIDENCE IS NOW THEY DON'T HAVE THE RESOURCES.
17 WHAT WOULD HAPPEN IN THE FUTURE?

18 THE EVIDENCE IS THE D.A. -- I WON'T SAY WHAT THE
19 D.A.'S WILL SAY. THE EVIDENCE IS THAT YOU DON'T CATCH A PERSON
20 THE FIRST TIME HE OR SHE COMMITS A CRIME, THE EVIDENCE IS
21 PEOPLE WHO ARE REARRESTED COMMIT MANY MORE CRIMES THAN THEY
22 COMMIT -- MANY MORE CRIMES THAN THE ONE THAT THEY GET CAUGHT
23 FOR. THERE WAS EVIDENCE IN THE RECORD THAT MANY TIMES MORE, 12
24 TIMES MORE.

25 WE TALKED ABOUT THE L.A. COUNTY EARLY RELEASE

1 PROGRAM. THAT WAS A RELEASE BECAUSE OF A POPULATION CAP ON A
2 JAIL SYSTEM, NOT A PRISON SYSTEM. NOT A PRISON SYSTEM COMPOSED
3 OF THE FOLKS THAT I JUST TOLD YOU ABOUT THAT ARE MORE AND MORE
4 FOR VIOLENT CRIMES, THAT LESS AND LESS ARE FOR DRUG OFFENSES.
5 THIS IS JUST FROM A JAIL SYSTEM. THAT BETWEEN 2002 AND 2006
6 THERE WAS, APPROXIMATELY, 10 PERCENT OF THE FOLKS RELEASED
7 EARLY FROM COUNTY JAIL IN L.A. COMMITTED ADDITIONAL CRIMES AND
8 16 WERE ARRESTED FOR MURDER.

9 THE EVIDENCE IS THAT THE -- BEFORE THIS COURT THE
10 EVIDENCE IS THAT THERE ARE POPULATION CAPS ON 32 PRISONS AND
11 THAT THE POLICE DEPARTMENT --

12 **JUDGE KARLTON:** THIRTY-TWO JAILS.

13 **MR. MELLO:** THIRTY-TWO COUNTY JAILS OF THE 58
14 COUNTIES.

15 I HAVE TO ADMIT I'M GETTING A LITTLE TIRED. I
16 APOLOGIZE.

17 THAT THERE IS A CAP ON THE 32 OF THE 58. THAT POLICE
18 AND JAIL RESOURCES ARE STRETCHED. THAT POLICE FORCES ARE BEING
19 CUT AS WE SPEAK.

20 WHAT DOES THIS MEAN IF THERE IS A POPULATION
21 REDUCTION? SOMETHING -- 52,000 OR SOMETHING ELSE? WHAT IT
22 MEANS IS THERE WILL BE MORE CRIMINALS ON THE STREET. THERE
23 WILL BE MORE CRIME BECAUSE YOU DON'T CATCH THEM EVERY TIME AND
24 THERE WILL BE LESS POLICE TO CATCH THEM ANYWAYS.

25 IT MEANS THAT THERE WILL BE LESS D.A.'S TO PROSECUTE

1 THEM AND THERE WILL BE LESS SPACE AT THE LOCAL JAILS TO DEAL
2 WITH THEM. AND WE'VE ALREADY HEARD THAT THERE AREN'T THE LOCAL
3 RESOURCES TO DEAL WITH THE PROBLEMS.

4 SO I THINK THAT'S WHAT THE EVIDENCE IS. THE EVIDENCE
5 IS JUST -- IN CLOSING, AND THEN I WILL GLADLY PASS THE MIC ON
6 TO MISS TILLMAN. THE EVIDENCE IS I DON'T BELIEVE THAT THE
7 PRIMARY CAUSE HAS BEEN MET CLEAR AND CONVINCING.

8 I DON'T BELIEVE THE RECORD SUPPORTS THAT THE RELIEF
9 REQUESTED WILL REMEDY IT. I DON'T BELIEVE THAT PLAINTIFFS HAVE
10 PROVEN UP WHAT THE POPULATION HAS TO BE.

11 AND I BELIEVE THAT THE EVIDENCE IS QUITE CLEAR THAT
12 THERE WILL BE A SUBSTANTIAL ADVERSE IMPACT ON PUBLIC SAFETY AND
13 TO THE ADMINISTRATION OF CRIMINAL JUSTICE IF THIS PRISONER
14 RELEASE ORDER IS GRANTED.

15 AND I THANK THE COURT FOR ITS TIME AND FOR THE
16 DISCUSSION. THANK YOU.

17 **JUDGE REINHARDT:** THANK YOU, MR. MELLO.

18 **CLOSING ARGUMENT**

19 **MS. TILLMAN:** GOOD AFTERNOON. MAY IT PLEASE THE
20 COURT AND COUNSEL. THANK YOU FOR THIS OPPORTUNITY TO PRESENT A
21 SEPARATE CLOSING STATEMENT ON BEHALF OF THE COLEMAN DEFENDANTS.

22 AT THE START OF THIS CASE, AS YOU MAY RECALL, THE
23 COLEMAN DEFENDANTS DESCRIBED TO YOU THIS CLOSED CIRCUIT NATURE
24 OF THE MENTAL HEALTH CARE SYSTEM DEVELOPED EVEN IN THE CONTEXT
25 OF INCREASED POPULATION PRESSURES SINCE 1994.

1 THEIR PROVISION OF MENTAL HEALTH CARE TO THAT
2 POPULATION OF INMATES WITH SERIOUS MENTAL DISORDERS NOW
3 INVOLVES AN IDENTIFIED AND ESTABLISHED POPULATION OF INMATES.

4 IT NOW INVOLVES THE CARE OF THOSE PATIENTS IN
5 PROGRAMS OR WHAT THEY CALL LEVELS OF CARE ESTABLISHED BY
6 COURT-APPROVED POLICIES AND PROCEDURES.

7 NOW INVOLVES SEPARATE CLINICAL STAFF, FROM
8 PSYCHIATRISTS TO SOCIAL WORKERS, PROVIDING CARE TO THESE
9 INMATES WITH SERIOUS MENTAL DISORDERS.

10 NOW INVOLVES THE DESIGNATED MENTAL HEALTH CARE BEDS
11 THAT PROVIDE SEPARATE HOUSING, OFTEN SEPARATE DINING AND
12 RECREATION AREAS.

13 **JUDGE KARLTON:** YOU KNOW, MISS TILLMAN, BECAUSE YOU
14 AND I HAVE BEEN THERE, THAT WE'RE OVER 1,000 BEDS -- I'M MAKING
15 THAT NUMBER UP -- BUT RIGHT NOW THAT WE DON'T HAVE FOR MENTALLY
16 ILL PATIENTS. IF WE LET OUT HOWEVER MANY PEOPLE, WE WOULD HAVE
17 THOSE BEDS. WE COULD PROVIDE THEM WITH CARE.

18 **MS. TILLMAN:** I CAN'T AGREE TO THAT, YOUR HONOR. I
19 BELIEVE THE DEFENDANTS' EVIDENCE ESTABLISHES THAT THAT IS NOT
20 THE CASE.

21 IN FACT, AS YOU KNOW, THE FORMER SPECIAL MASTER,
22 MR. KEATING, INDICATED THAT YOU COULD LET OUT 100,000 INMATES
23 AND YOU WOULD STILL NOT HAVE THE APPROPRIATE BEDS WITH THE
24 APPROPRIATE STAFF TO PROVIDE APPROPRIATE CARE.

25 **JUDGE KARLTON:** OF COURSE, BUT WE DON'T HAVE BEDS

1 RIGHT NOW. LITERALLY, THERE WERE TERRIBLY SICK PEOPLE IN
2 GENERAL POPULATION BECAUSE WE DON'T HAVE BEDS. THAT'S THE
3 REALITY. CERTAINLY, THEY NEED APPROPRIATE CARE,
4 PHARMACEUTICALS, ET CETERA.

5 BUT RIGHT NOW THE SITUATION IS THERE ARE TERRIBLY
6 SICK PEOPLE IN -- I AGREE WITH WHOEVER THE DEFENDANTS' EXPERT
7 WAS. THIS ISN'T AS BAD AS AUSCHWITZ, AS IF THAT MATTERED, BUT
8 TERRIBLY SICK PEOPLE WHO DON'T HAVE BEDS. HOW CAN WE PRETEND
9 THAT THAT'S NOT AN OVERCROWDING PROBLEM?

10 **MS. TILLMAN:** LET'S TAKE A LOOK AT WHERE THOSE PEOPLE
11 ARE LOCATED THEN.

12 WITH ALL DUE RESPECT TO THIS COURT, WHAT WE SEE IN
13 FRONT OF US IS AN ASSERTION BY THE PLAINTIFFS THAT IT'S THE
14 OVERALL POPULATION OF THE DEPARTMENT OF CORRECTIONS AND
15 REHABILITATION THAT IS THE PRIMARY CAUSE FOR THE CONSTITUTIONAL
16 DEFICIENCIES IN THE MENTAL HEALTH CARE SYSTEM; NAMELY, BEDS.

17 YET, WHEN YOU TAKE A LOOK AT WHERE THE PATIENTS ARE
18 LOCATED, WHEN YOU TAKE A LOOK AT WHERE THEY WERE LOCATED IN
19 1994 --

20 **JUDGE KARLTON:** I KNOW IT'S SO MUCH BETTER NOW, BUT
21 WHAT WE HAVE ARE -- I'M SORRY, I DON'T HAVE THE FIGURE AT MY
22 FINGERTIPS. I THOUGHT I DID, BUT I DON'T.

23 THERE IS A SIGNIFICANT NUMBER -- MAYBE IT'S NOT
24 1,000. I THINK IT IS, BUT WHATEVER IT IS -- FOLKS WHO ARE IN
25 THE GENERAL POPULATION BECAUSE WE DON'T HAVE BEDS FOR THEM.

1 **MS. TILLMAN:** AND SO IS THE APPROPRIATE RESPONSE TO
2 THAT, ASSUMING THAT, INDEED, THE SHEER NUMBER OF PEOPLE WITHIN
3 THE CONFINES AND CUSTODY OF CDCR IS SOMEHOW CAUSING THIS
4 DEFICIENCY IN MENTAL HEALTH BEDS FOR SEVERELY MENTALLY
5 DISORDERED INMATES, ASSUMING THAT TO BE THE CASE -- WHICH
6 DEFENDANTS DON'T AGREE TO, BUT WE'LL ASSUME IT ARGUENDO
7 TODAY -- IS IT TRULY THE APPROPRIATE RELIEF TO GO AHEAD AND
8 RELEASE INMATES?

9 WOULD THAT ACTUALLY ENABLE THE CREATION OF THE VERY
10 BEDS THAT THIS COURT WANTS TO SEE ACTIVATED AS SOON AS
11 POSSIBLE?

12 DEFENDANTS ADMIT THAT THAT IS NOT GOING TO PROVIDE
13 THE REMEDY. PLAINTIFFS' OWN EXPERTS HAVE SAID THAT. YOU SAW
14 DR. HANEY TESTIFY OVER TWO DAYS. YOU SAW DR. STEWART TESTIFY
15 OVER TWO DAYS. EACH OF THEM USED THE SAME WORDS, "IT'S THE
16 FIRST STEP."

17 **JUDGE KARLTON:** OF COURSE.

18 **MS. TILLMAN:** IT'S NOT GOING TO -- DR. HANEY SAYS IT
19 BEST.

20 **JUDGE KARLTON:** OF COURSE.

21 **MS. TILLMAN:** THERE IS NO MAGIC NUMBER. A
22 CONSTITUTIONALLY COMPLIANT SYSTEM WILL NOT MAGICALLY APPEAR.
23 WE WILL STILL NEED BEDS AND STAFF.

24 AND, IN FACT, THE VERY ACTIONS THAT WILL BE NECESSARY
25 TO GET THOSE BEDS, TO GET THOSE STAFF ARE ALREADY UNDERWAY.

1 **JUDGE KARLTON:** ALL RIGHT. GO AHEAD. GO AHEAD.

2 **MS. TILLMAN:** THE COLEMAN DEFENDANTS CONTEND THAT THE
3 PLAINTIFFS CANNOT MEET THEIR BURDEN OF PROVING UPON CLEAR AND
4 CONVINCING EVIDENCE THAT THE OVERALL POPULATION OF THE
5 DEPARTMENT OF CORRECTIONS IS THE PRIMARY CAUSE OF
6 CONSTITUTIONAL DEFICIENCIES IN THE MENTAL HEALTH CARE SYSTEM.

7 FURTHER, PLAINTIFFS CANNOT ESTABLISH THAT A PRISONER
8 RELEASE ORDER WILL RENDER THE MENTAL HEALTH CARE SYSTEM
9 CONSTITUTIONAL.

10 INDEED, EVEN THE PLAINTIFFS ADMIT THAT THE RELIEF
11 NECESSARY TO RENDER THE MENTAL HEALTH CARE SYSTEM
12 CONSTITUTIONAL IS THE VERY ACTION UNDERTAKEN AND ALREADY
13 UNDERWAY BY THE DEFENDANTS, FROM THE STAFFING OF CLINICAL
14 POSITIONS TO THE BUILDING OF THE MENTAL HEALTH CARE BEDS. WE
15 HAVE SEEN THE GROWTH IN THOSE BEDS FROM THE FEW HUNDREDS THAT
16 WERE ONLINE IN 1994 TO OVER 30,000 TODAY ONLINE.

17 THE THIRD ELEMENT AND PERHAPS THE MOST HEART-RENDING
18 ELEMENT OF THIS ISSUE IS, OF COURSE, THE ADVERSE IMPACT TO
19 PUBLIC SAFETY BY A PRISONER RELEASE ORDER, PARTICULARLY ONE
20 INVOLVING THE RELEASE OR -- THE INSTITUTIONALIZATION OF
21 MENTALLY ILL INMATES THAT WILL ADVERSELY IMPACT PUBLIC SAFETY
22 AS WELL AS MENTALLY ILL INMATES THEMSELVES.

23 BECAUSE OF THE VARIOUS ASSIGNMENTS THE COURT NETWORK
24 IS NECESSARY FOR THE ONGOING LIFETIME NEEDS FOR THE PSYCHIATRIC
25 CARE AND SUPPORT OF THESE MENTALLY ILL INMATES IS, AT BEST,

1 SHREDDED AND MORE OFTEN THAN NOT NONEXISTENT IN OUR
2 COMMUNITIES. THE RELEASE OF THE MENTALLY ILL INMATES WILL
3 SERVE TO HARM THEM FURTHER.

4 IN SUM, PLAINTIFFS CANNOT SHOW AND HAVE NOT SHOWN
5 THAT A RELEASE ORDER WILL IN ANY WAY BENEFIT OR ENABLE THE
6 FURTHER DEVELOPMENT OF THE MENTAL HEALTH CARE SYSTEM.

7 KEEP IN MIND THIS MENTAL HEALTH CARE SYSTEM WAS
8 CREATED UPON A MOTIF OF INCLUSION. IT'S A SERVICE MODEL. IT'S
9 NOT ABOUT EXCLUDING THOSE IN NEED.

10 AND, CERTAINLY, PLAINTIFFS CAN'T SHOW THAT A RELEASE
11 WILL BENEFIT THOSE INMATES LITERALLY KEPT APART IN SEPARATE
12 HOUSING, IN STRUCTURED THERAPEUTIC ENVIRONMENTS FOR THEIR OWN
13 SAFETY AND STABILIZATION.

14 THIS PRISONER RELEASE ORDER SOUGHT BY PLAINTIFFS MUST
15 BE DENIED AS INTRUSIVE, UNNECESSARY AND ULTIMATELY AS HARMFUL.

16 WE'VE TALKED ABOUT PRIMARY CAUSE. I DON'T WANT TO GO
17 OVER GROUND THAT WE'VE ALREADY COVERED, BUT LET ME SAY THIS.
18 IT'S MORE THAN A MATTER OF TWO EVENTS HAPPENING AT THE SAME
19 TIME. THERE MUST BE A LINK, A CAUSAL LINK BETWEEN THE TWO
20 EVENTS.

21 AND HERE IS WHERE PLAINTIFFS' PROOF OF PRIMARY CAUSE
22 IN THE COLEMAN CASE FAILS. THERE IS SIMPLY NO CAUSAL LINK
23 BETWEEN THE INCREASE IN THE DEFENDANTS' INMATE POPULATION SINCE
24 THE COLEMAN JUDGMENT IN 1994 AND THE STATUS OF THE MENTAL
25 HEALTH CARE SYSTEM TODAY.

1 PLAINTIFFS CANNOT SHOW THE PRIMARY CAUSE BECAUSE
2 DEFENDANTS HAVE SUCCEEDED IN THE DEVELOPMENT OF A MENTAL HEALTH
3 CARE SYSTEM, EVEN AGAINST THIS BACKDROP OF POPULATION GROWTH.

4 PLAINTIFFS' OWN EXPERT, CRAIG HANEY, WHO TESTIFIED AT
5 THE UNDERLYING COLEMAN TRIAL IN 1994, TESTIFIED BACK THEN THAT
6 THERE WAS AN OVERCROWDING SITUATION. HE TESTIFIED THERE WAS
7 LITERALLY GROUND ZERO, MOONSCAPE, NO MENTAL HEALTH CARE SYSTEM
8 IN A VIABLE FORM AT THE TIME OF THAT TRIAL.

9 HE TESTIFIED THAT ONLY 7.9 PERCENT OF THE POPULATION
10 WAS IDENTIFIED AS NEEDING MENTAL HEALTH CARE. HE TESTIFIED,
11 AND YOU HEARD DEFENDANTS' WITNESSES, ROBIN DEZEMBER AND CINDY
12 RADAUSKY, TESTIFY THAT THIS SAME FAILURE TO RECOGNIZE MENTAL
13 ILLNESS MEANT ALSO THAT THE STATE PRISONS AND STATE HOSPITALS
14 THEMSELVES WERE NOT BUILT WITH THE MENTALLY ILL IN MIND.

15 IN SUM, THERE WAS NO SCREENING FOR MENTAL ILLNESS.
16 THERE WAS NO TREATMENT FOR MENTAL ILLNESS. THERE WERE NO BEDS
17 FOR MENTAL ILLNESS IN A FORM THAT ENABLED COMPREHENSIVE AND
18 UNIFORM CARE. THAT WAS 1994.

19 MOVING FORWARD IN TIME TO 2008, WE HAVE JUST THE
20 REVERSE. THERE HAS LITERALLY BEEN A SEA CHANGE. DEFENDANTS
21 NOT ONLY HAVE WORKED WITH THE COLEMAN SPECIAL MASTER TO CREATE
22 A MENTAL HEALTH CARE SYSTEM. DEFENDANTS RESPECTFULLY SUBMIT
23 THAT THAT MENTAL HEALTH CARE SYSTEM IS NOW IN A FORM THAT IS
24 VIABLE AND IS WORKING TO PROVIDE CARE AND TREATMENT TO MENTALLY
25 ILL INMATES.

1 THERE IS SCREENING AND IDENTIFICATION OF THE MENTALLY
2 ILL. PLAINTIFFS' EXPERT, DR. HANEY, AGREED WITH THAT. THERE
3 IS NOW SOME 20 PERCENT OF THE POPULATION OF CDCR IDENTIFIED AS
4 NEEDING AND GETTING THE CARE THAT THEY REQUIRE.

5 IT'S UNDISPUTED THE COLEMAN COURT HAS APPROVED THE
6 POLICIES AND PROCEDURES NECESSARY TO PROVIDE CONSTITUTIONALLY
7 ADEQUATE CARE.

8 MENTAL HEALTH CARE BEDS, THOSE BEDS HAVE GROWN FROM
9 3200 TO SOME 30,000 SINCE 1994.

10 **JUDGE KARLTON:** AND THERE ARE OVER A THOUSAND PEOPLE
11 WHO DO NOT HAVE MENTAL HEALTH BEDS.

12 **MS. TILLMAN:** AND DEFENDANTS RESPECTFULLY SUBMIT THAT
13 THEIR RECORD IN THIS CASE SHOWS THAT THEY ARE NOT DELIBERATELY
14 INDIFFERENT TO THAT CONCERN OF THIS COURT.

15 THE TESTIMONY HAS BEEN THAT THERE ARE PLANS. THERE
16 IS A COMMITMENT TO PROVIDE THOSE BEDS TO --

17 **JUDGE KARLTON:** YOU KNOW WHAT? WE'VE GOT WHAT? I'M
18 GOING TO MAKE THIS UP, BUT THERE ARE THREE -- I BELIEVE, THREE
19 PLANNED BEDS -- THREE PLANS FOR BEDS, 60 AND 20 AND 90 OR
20 SOMETHING. THEY ARE THREE YEARS AWAY. THERE IS NO -- THEY ARE
21 NOT SHOVEL READY, TO USE THE GOVERNOR'S PHRASE. OH, WE ARE NOT
22 ALLOWED TO QUOTE THE GOVERNOR.

23 THAT'S THE REAL WORLD. AND GETTING THOSE PEOPLE TO
24 BEDS WHERE THEY CAN BE SEGREGATED AND TREATED AND DO ALL THE
25 THINGS THAT THE PLAN CONTEMPLATES SIMPLY REQUIRES THAT THEY BE

1 GIVEN BEDS. AND WE CAN'T SAY, YOU GIVE THEM BEDS AND, YOU
2 KNOW, YOU FOLKS YOU STAND UP FOR THE REST OF YOUR TERM. CAN'T
3 DO THAT.

4 **MS. TILLMAN:** THE TESTIMONY HAS BEEN, FIRST, FOR
5 THOSE PATIENTS IN THE LOWEST LEVEL OF CARE, THE COORDINATED
6 CLINICAL CASE MANAGEMENT PATIENTS, OR TRIPLE CMS, THE VAST
7 MAJORITY OF THOSE PATIENTS ARE HOUSED IN APPROPRIATE AREAS.
8 THEY ARE PROVIDED CARE --

9 **JUDGE KARLTON:** I AGREE. KEEP IN MIND THERE IS NOT A
10 SINGLE PERSON IN THE COLEMAN CLASS THAT HAS NOT BEEN DESIGNATED
11 AS HAVING AN AXIS I ILLNESS. THESE ARE NOT PEOPLE WITH -- NOT
12 CRAZY LIKE YOU AND I. THEY ARE REALLY CRAZY IN WAYS THAT ARE
13 DRAMATICALLY DIFFERENT THAN EVERYBODY ELSE.

14 **MS. TILLMAN:** AND THESE ARE CHRONIC AFFLICTIONS THAT
15 ARE INCURABLE, THAT WILL EXPERIENCE, AS MR. RADAUSKY SAID FROM
16 THE DEPARTMENT OF MENTAL HEALTH, EBBS AND FLOWS AND PERIODS OF
17 TIME WHEN THEY WILL NEED INPATIENT CARE AND OTHER PERIODS OF
18 TIME WHERE A STRUCTURED ENVIRONMENT LIKE THAT WHICH IS PROVIDED
19 BY ENHANCED OUTPATIENT PROGRAM BEDS, WHICH ARE SEPARATE FROM
20 THE GENERAL POPULATION, THEY WILL RECEIVE.

21 BUT GETTING BACK TO THOSE PATIENTS WHO CAN ACTUALLY
22 INTEGRATE AT LEAST IN THE GENERAL POPULATION, WHAT WE SEE ARE
23 THE VAST MAJORITY ARE IN TRADITIONAL HOUSING.

24 THERE HAS BEEN NO CRITICISM OF THE FEW THAT ARE IN
25 NON-TRADITIONAL BEDS. FIND A SPECIAL MASTER. WHAT WE HEAR IS,

1 ADEQUATE CARE CAN AND HAS BEEN DELIVERED, EVEN IN THOSE AREAS
2 OF OUR PRISONS.

3 BUT TO THE EXTENT THAT THIS COURT IS WORRIED ABOUT
4 THOSE BEDS, THIS COURT HAS RECEIVED TESTIMONY FROM SCOTT KERNAN
5 HIMSELF, WHO IS IN CHARGE OF THE OUT-OF-STATE TRANSFER PROGRAM.
6 YOU'VE HEARD ABOUT THE REDUCTION IN THE NON-TRADITIONAL BEDS
7 AND THE FURTHER REDUCTION IN THE NON-TRADITIONAL BEDS IN THE
8 COMING MONTHS.

9 THE POINT IS, THE DEFENDANTS ARE ACTING TO GET RID OF
10 THOSE NON-TRADITIONAL BEDS.

11 MOVING TO THE ENHANCED OUTPATIENT PROGRAM CARE,
12 YOU'VE HEARD EVIDENCE THAT THERE ARE PATIENTS WHO ARE SEPARATED
13 AND GIVEN A PARTICULAR STRUCTURED ENVIRONMENT BECAUSE OF THEIR
14 NEEDS AS ENHANCED OUTPATIENT PROGRAM PATIENTS.

15 YOU ALSO HEARD EVIDENCE THAT TO THE EXTENT THAT THOSE
16 PATIENTS SOMETIMES HAVE TO WAIT IN RECEPTION FOR THOSE
17 PARTICULAR BEDS, THEY ARE GIVEN THAT VERY CARE IN RECEPTION.
18 IN FACT, THE SPECIAL MASTER HAS FOUND THAT THAT TYPE OF CARE IN
19 THE RECEPTION AREAS IS BEING PERFORMED.

20 IF YOU TAKE A LOOK AT THE 20TH ROUND REPORT, YOU WILL
21 FIND THAT THE SPECIAL MASTER IN SEPTEMBER OF 2008 REPORTED THAT
22 AT SAN QUENTIN'S RECEPTION CENTER, THE ENHANCED OUTPATIENT
23 PROGRAM, RECEPTION PROGRAM, DEMONSTRATED CONTINUED POSITIVE
24 GROWTH DURING THIS MONITORING PERIOD, WITH CASE MANAGER
25 CONTACTS IN A PRIVATE SETTING OCCURRING 90 TO 100 PERCENT OF

1 THE TIME. THAT'S AT PAGE 104.

2 **JUDGE KARLTON:** WHY IS IT THAT THE SPECIAL MASTER'S
3 FINAL CONCLUSION, WHICH IS THAT WHATEVER BENEFITS, WHATEVER
4 PROGRESS WE'VE MADE IN THE LAST 12 YEARS IS LIKELY TO BE
5 OVERWHELMED BY THE OVERPOPULATION. WHY ISN'T THAT A MATTER OF
6 SUFFICIENT CONCERN TO THIS COURT?

7 **MS. TILLMAN:** I THINK, YOUR HONOR, THE DEFENDANTS
8 WOULD SUBMIT THAT THEY ARE TAKING ACTION TO ADDRESS THOSE
9 CONCERNS OF THIS COURT, AND THAT ACTION INCLUDES PROVIDING CARE
10 EVEN IN SURROUNDINGS THAT PERHAPS ARE NOT COSMETICALLY
11 PLEASING.

12 THE DEFENDANTS WOULD SUBMIT THAT WHETHER IT'S
13 RECEPTION PATIENTS GETTING ENHANCED OUTPATIENT CARE WHILE IN
14 RECEPTION OR WHETHER IT'S PATIENTS WHO CAN ONLY BE PROVIDED
15 APPROPRIATE GROUP THERAPY WHILE PLACED IN A THERAPEUTIC MODULE,
16 THE EIGHTH AMENDMENT IS NOT DETERMINED BY COSMETICS. IT'S
17 DETERMINED BY WHETHER OR NOT CARE IS BEING DELIVERED.

18 AND THROUGHOUT THE MONITORING REPORT WHAT YOU SEE ARE
19 COMMENTS, OBSERVATIONS, FINDINGS AND CONCLUSIONS THAT CARE,
20 INDEED, IS BEING DELIVERED, EVEN IN DIFFICULT CIRCUMSTANCES
21 THAT SOME PEOPLE WOULD LIKE TO SEE IMPROVED.

22 WHAT WE SEE AT THE DEUEL VOCATIONAL INSTITUTION IS,
23 IS THE COURT FINDING -- THE COURT MONITOR FINDING COMPLIANCE
24 WITH RECEPTION CENTER PROTOCOLS, IS FINDING THAT TRANSFER
25 DEADLINES ARE BEING MET OVER 90 PERCENT OF THE TIME FOR

1 ENHANCED OUTPATIENT INMATES.

2 AT HIGH DESERT RECEPTION CENTER, THE SPECIAL MASTER
3 AGAIN FOUND SUBSTANTIAL COMPLIANCE WITH THE PROGRAM GUIDE
4 REQUIREMENTS.

5 SO WHAT WE SEE IS A PICTURE OF IMPROVEMENT, OF GROWTH
6 OF A MENTAL HEALTH CARE SYSTEM.

7 NOW, GRANTED, THE PATIENTS NEEDING HOSPITAL OR
8 INPATIENT CARE, THERE IS NO QUESTION THAT THEY ARE GETTING
9 CARE.

10 YOU HAD THE OPPORTUNITY, YOU HEARD MISS RADAUSKY FROM
11 THE DEPARTMENT OF MENTAL HEALTH SPEAK TO THE TYPE OF CARE THAT
12 THE DEPARTMENT OF MENTAL HEALTH PROVIDES TO THESE INPATIENT
13 MEMBERS OF THE COLEMAN CLASS. THEY ARE HOUSED IN SEPARATE
14 AREAS --

15 **JUDGE KARLTON:** YOU KNOW, MA'AM, EVERY SINGLE
16 IMPROVEMENT, EVERY ONE, IS A RESULT OF A COURT ORDER. SO
17 NEVERMIND THAT THE DEPARTMENT OF MENTAL HEALTH HAS ENORMOUS
18 DIFFICULTY OBEYING THE MOST BASIC ORDERS OF THE COLEMAN COURT,
19 BUT TO SPEAK OF -- NEVER MIND. GO AHEAD. JUST GET IT OVER
20 WITH. GO AHEAD.

21 **MS. TILLMAN:** IF I MIGHT RESPOND, YOUR HONOR. I
22 RECOGNIZE AND I HAVE CAN SEE A CERTAIN LEVEL OF FRUSTRATION.
23 THERE ARE A LOT OF COURT ORDERS THAT HAVE BEEN ISSUED BY THE
24 COLEMAN COURT. AS MUCH AS THAT MIGHT BE INTERPRETED IN SOME
25 FASHION OR ANOTHER, THERE IS NO QUESTION THAT THE DEFENDANTS

1 HAVE BEEN RESPONSIVE TO THOSE COURT ORDERS, HAVE WORKED WITH
2 THE COLEMAN SPECIAL MASTER ON ITEMS SMALL AND LARGE IN THE
3 DELIVERY OF MENTAL HEALTH CARE.

4 PART OF THAT WORK HAS BEEN DOING THE VERY BEST PLANS
5 THAT YOU SEE NOW BEING ACTIVATED, BEING IMPLEMENTED. WHETHER
6 IT'S THE SALINAS VALLEY STATE PRISON INPATIENT BEDS THAT ARE
7 GOING TO BE ACTIVATED IN 2009. ACCORDING TO MISS RADAUSKY,
8 THEY ARE ALMOST DONE. SHE HOPED FOR ACTIVATION IN FEBRUARY
9 2009. THAT'S 64 INPATIENT BEDS.

10 OR WHETHER IT'S THE MENTAL HEALTH CRISIS BEDS THAT WE
11 SAW ACTIVATED IN JUNE 2008 AT THE CALIFORNIA MEDICAL FACILITY.
12 CLEARLY, BED PLANNING IS UNDERWAY. AND ONE OF THE REASONS
13 THOSE BEDS HAVE GOTTEN UNDERWAY AND BED PLANNING IS UNDERWAY IS
14 BECAUSE THE COLEMAN COURT URGED THE DEFENDANTS TO ADOPT A
15 FORECAST METHODOLOGY, A FORECAST METHODOLOGY NOT JUST FOR BEDS,
16 BUT FOR STAFF.

17 THAT'S A CRUCIAL COMPONENT OF PROVIDING FOR THE CARE
18 THAT IS NEEDED, NOT ONLY FOR TODAY, BUT FOR TOMORROW, SO THAT
19 COURT ORDERS WON'T BE NECESSARY.

20 INSTEAD THERE IS AN INTEGRAL MECHANISM WITHIN THE
21 CDCR ADMINISTRATION NOW THAT CAN DETERMINE, BECAUSE OF WORK
22 WITH THE SPECIAL MASTER FROM THE COLEMAN COURT -- CAN DETERMINE
23 WITH VALIDATED METHODOLOGY HOW MANY BEDS ARE GOING TO BE NEEDED
24 IN THE COMING YEARS, WHAT TYPE OF BEDS FOR THE MENTALLY ILL,
25 AND WHAT TYPE OF STAFF WILL BE NECESSARY TO HANDLE THE WORKLOAD

1 EMANATING FROM THAT CARE OF THOSE MENTALLY ILL PATIENTS.

2 AND JUST AS A NOTE. IT HAS TO BE ACKNOWLEDGED BY
3 THIS COURT. ROBIN DEZEMBER SAID IT BEST. THERE HAS BEEN A
4 HUGE IMPROVEMENT IN THE STAFFING OF MENTAL HEALTH BEDS.

5 AS MUCH AS HE DESCRIBED THE RECRUITMENT AND PAY
6 PARITY STRATEGIES THAT WERE ADOPTED WITH THE COURT'S ORDERS AND
7 WITH THE COURT'S HELP, THERE IS NO QUESTION THE DEFENDANTS
8 WORKED HARD TO RECRUIT THE VERY STAFF THAT IT HAS, WORKED HARD
9 TO GET THE POSITIONS ALLOCATED THEY NOW HAVE, TO EXPAND THEIR
10 STAFFING FROM THE HUNDREDS INTO THE THOUSANDS.

11 NOT ONLY HAS CLINICAL STAFFING IMPROVED, BUT THE
12 PICTURE FOR CORRECTIONAL OFFICERS HAS ALSO IMPROVED. WHAT WE
13 SEE IS A MENTAL HEALTH CARE SYSTEM THAT BRINGS TOGETHER NOT
14 ONLY THE CORRECTIONAL OFFICERS AND THE MENTAL HEALTH CARE
15 CLINICIANS, BUT ALSO THE FACILITY MANAGERS, THE PLANT
16 OPERATIONS PEOPLE.

17 THE CORRECTIONAL OFFICERS, WE KNOW FROM SCOTT
18 KERNAN'S TESTIMONY, FORM AN INTEGRAL PART OF THE
19 INTERDISCIPLINARY MENTAL HEALTH SERVICES TEAM, ESCORTING
20 PATIENTS TO THEIR APPOINTMENTS, MONITORING MENTAL HEALTH
21 PATIENTS WHO ARE AT RISK FOR SUICIDES, CONDUCTING ROUNDS ON
22 MENTALLY ILL INMATES, STAFFING RECREATION YARDS, PARTICIPATING
23 IN TREATMENT DISCUSSIONS, LITERALLY WORKING TO DEVELOP THE PLAN
24 TO PREVENT SUICIDES IN ADMINISTRATIVE SEGREGATION UNITS.

25 THE VERY UNITS THAT DO NOT EXPERIENCE THE

1 NON-TRADITIONAL BEDS THIS COURT IS SO WORRIED ABOUT ARE THE
2 UNITS, OF COURSE, THAT, UNFORTUNATELY, EXPERIENCE THE HIGHEST
3 RATE OF SUICIDES.

4 THANKS TO THIS SUCCESS IN STAFFING THE CORRECTIONAL
5 OFFICERS TO THE POINT WHERE A JANUARY ACADEMY WAS CANCELED.
6 AND AS SCOTT KERNAN SAID, THE PRISONS ARE NOW FULL UP WITH
7 CORRECTIONAL OFFICERS. THANKS TO THAT SUCCESS, THE SUICIDE
8 PREVENTION PROGRAM IS BEING IMPLEMENTED THROUGHOUT THE SYSTEM.

9 THE PAY PARITY AND STAFFING SUCCESSES OF THE
10 DEPARTMENT OF CORRECTIONS ARE MATCHED BY THE SAME SUCCESSES AS
11 THE DEPARTMENT OF MENTAL HEALTH. CDCR'S PARTNER IN INPATIENT
12 MENTAL HEALTH CARE NOW HAS A SUFFICIENT NUMBER OF
13 PSYCHIATRISTS, THANKS TO THOSE STRATEGIES.

14 SIMPLY PUT, THERE IS NO REASON TO EXCLUDE THE
15 MENTALLY ILL FROM CARE WITHIN THE DEPARTMENT OF CORRECTIONS AND
16 REHABILITATION BY WAY OF A COURT ORDERED RELEASE WHEN THE
17 RELEASE ITSELF WILL NOT RENDER THE MENTAL HEALTH CARE SYSTEM
18 CONSTITUTIONALLY ADEQUATE, WILL NOT RESULT IN ANY IMPROVEMENTS
19 IN THE MENTAL HEALTH CARE SYSTEM.

20 PLAINTIFFS' OWN EXPERTS, DR. HANEY AND DR. AUSTIN --
21 DR. HANEY AND DR. STEWART SAID IT BEST. A RELEASE IS ONLY THE
22 FIRST STEP. THE HARD WORK OF ADMINISTERING A MENTAL HEALTH
23 CARE SYSTEM, REGARDLESS OF THE NUMBER OF INMATES, REGARDLESS OF
24 THE NUMBER OF PATIENTS, WOULD REMAIN. AND THAT IS ENSURING
25 ADEQUATE STAFFING, ADEQUATE BEDS, ADEQUATE PROGRAMMING.

1 DR. HANEY AGREED, THERE IS NO MAGIC NUMBER. IN FACT,
2 THERE APPEARS TO BE NO EQUILIBRIUM POINT AT ALL. HE ADMITTED
3 EVEN A SYSTEM THAT IS OPERATING BELOW ITS RATED CAPACITY COULD
4 STILL BE CONSTITUTIONALLY DEFICIENT ABSENCE ADEQUATE RESOURCES
5 FOR MENTAL HEALTH CARE.

6 SO IN OTHER WORDS, WE COULD GO THROUGH ALL THE WORK
7 OF RESPONDING TO WHATEVER COURT ORDER FOR A PRISONER RELEASE
8 MIGHT EMANATE FROM THIS COURT ONLY TO FIND THAT THE WORK
9 REMAINS OF BUILDING STAFF, BUILDING BEDS, BUILDING THE
10 ADMINISTRATIVE MACHINES TO ENSURE ADEQUATE HEALTH CARE.

11 IT'S CLEARLY NOT ABOUT POPULATION WITHIN THE
12 DEPARTMENT OF CORRECTIONS. IT'S ABOUT BEDS AND STAFF NEEDED BY
13 ANY HEALTH CARE PROVIDER, BUT CERTAINLY THE LARGEST HEALTH CARE
14 PROVIDER IN THE STATE CORRECTIONAL SYSTEM WITHIN THE
15 UNITED STATES TO CARRY FORTH ITS MISSION OF TREATING THE
16 MENTALLY ILL.

17 THE LEAST INTRUSIVE RELIEF THEN IS TO PERMIT
18 DEFENDANTS TO CONTINUE THEIR ONGOING EFFORTS, HOPEFULLY, UNDER
19 AND WITH THE OVERSIGHT OF THE COLEMAN SPECIAL MASTER.

20 THIS COURT HEARD THE EVIDENCE TIME AND AGAIN FROM
21 DIFFERENT WITNESSES, CINDY RADAUSKY FROM THE DEPARTMENT OF
22 MENTAL HEALTH, ROBIN DEZEMBER FROM THE DEPARTMENT OF
23 CORRECTIONS, SECRETARY CATE, THAT THE MENTAL HEALTH CARE SYSTEM
24 HAS NOT ONLY GROWN IN SIZE AND IN STAFF AND IN COMPLEXITY, BUT
25 MOST IMPORTANTLY IN THE STRENGTH OF ITS MISSION.

1 IT IS NO LONGER IGNORED OR DISREGARDED OR EVEN
2 DISCOUNTED. IT IS PART OF WHAT THE DEPARTMENT OF CORRECTIONS
3 PROVIDES TO ITS INMATES, TO ITS PATIENTS.

4 THE GROWTH THAT WE'VE SEEN IN THE MENTAL HEALTH CARE
5 SYSTEM HAS OCCURRED BECAUSE THE LEAST INTRUSIVE RELIEF, THE
6 ONGOING EFFORTS OF THE DEFENDANTS TO MEET THE MENTAL HEALTH
7 CARE NEEDS OF THESE PATIENTS WITH THE ASSISTANCE OF THE COLEMAN
8 SPECIAL MASTER IS WORKING.

9 THE COLEMAN SPECIAL MASTER HAS BEEN ABLE TO BROKER
10 NEGOTIATIONS ABOUT THE PROGRAM GUIDE. HE HAS BEEN ABLE TO
11 SHARE HIS STAFF'S EXPERTISE IN THE DEVELOPMENT OF A NOW
12 APPROVED COURT ORDERED AND IMPLEMENTED SUICIDE PREVENTION
13 PROGRAM. SHARE HIS STAFF'S EXPERTISE ON FORECAST
14 METHODOLOGIES. SHARE HIS STAFF'S EXPERTISE ON THE VERY
15 TREATMENT MODALITIES THAT WE NOW PROVIDE TO THE MENTALLY ILL BY
16 WAY OF THE PROGRAM GUIDE.

17 A PRISONER RELEASE ORDER WILL NOT ONLY BE INTRUSIVE,
18 IT WILL NOT SERVE THE INTERESTS OF THE MENTALLY ILL OR THE
19 LOCAL COMMUNITIES.

20 HOW WOULD IT SERVE THE MENTALLY ILL INMATE GETTING
21 STABILIZED IN A DESIGNATED MENTAL HEALTH BED, GETTING
22 MEDICATIONS, GETTING FOOD, GETTING SHELTER? HOW WOULD IT SERVE
23 THAT MENTALLY ILL INMATE TO BE RELEASED THREE OR FOUR MONTHS
24 EARLIER FROM THEIR ESTABLISHED DATE? THAT WOULD DEPRIVE THEM
25 OF THREE OR FOUR MONTHS OF TREATMENT THAT MAY WELL STABILIZE,

1 MAY WELL GIVE THEM THE MEDICATIONS NECESSARY TO PUT THEM IN A
2 SPACE, A PLACE WHERE THEY CAN REALLY BE READY TO REINTEGRATE
3 INTO THE COMMUNITY.

4 A MENTALLY ILL INMATE WILL BE -- THE MENTALLY ILL
5 INMATES WILL BE HARMED BY A PRISONER RELEASE ORDER. WE HAVE
6 ALREADY ACKNOWLEDGED THAT EXPERTS ALL AGREE MENTALLY ILL
7 INMATES WITHIN THE COLEMAN CASELOADS DO NOT HAVE AN ILLNESS
8 THAT WILL BE CURED.

9 IT'S A BIOLOGICAL AND METABOLIC DISEASE THAT THESE
10 INMATES HAVE AND THEY WILL EXPERIENCE DECOMPENSATION EVEN UNDER
11 THE BEST OF CIRCUMSTANCES. THEY WILL ALWAYS NEED CARE, WHETHER
12 INSIDE THE PRISON OR OUTSIDE THE PRISON.

13 YOU'VE HEARD PLAINTIFFS' EXPERT, DR. STEWART, SAY
14 THAT THEY WOULD EXPERIENCE THE NEED FOR A WIDE RANGE OF
15 PSYCHOTHERAPEUTIC SUPPORT. SOME MIGHT JUST NEED MEDICATION AND
16 VISITS TO A PSYCHIATRIST TO ENSURE THEIR MEDICATION IS
17 APPROPRIATE. OTHERS MIGHT NEED TO BE IN A BOARDING CARE HOME
18 OR EVEN A HOSPITAL.

19 ALL AGREED, MENTALLY ILL PAROLEES, LIKE OTHER
20 PAROLEES, WOULD NEED SUPPORT IN OBTAINING HOUSING, JOBS, JOB
21 SKILLS AND, MOST IMPORTANTLY, DRUG TREATMENT.

22 THE EVIDENCE CLEARLY ESTABLISHED THAT AT LEAST
23 70 PERCENT OF THE MENTALLY ILL INMATES HAVE A CO-OCCURRING
24 SUBSTANCE ABUSE DISORDER. AND, YET, THERE WAS NO EVIDENCE THAT
25 THE CARE THAT IS REQUIRED BY MENTALLY ILL INMATES ONCE PAROLED

1 ACTUALLY EXISTS IN THE COMMUNITY.

2 RATHER, WHAT WE'VE HEARD IS THE EFFORT OF DEFENDANTS
3 TO STRENGTHEN THAT SYSTEM OF THE PAROLE OUTPATIENT CLINICS, TO
4 WORK WITH LOCAL COMMUNITIES TO CREATE PARTNERSHIPS, BUT IT'S
5 NOT THERE YET.

6 IN FACT, ACCORDING TO NANCY PENA AND GAIL BATAILLE,
7 THERE IS NOT EVEN ENOUGH COMMUNITY SUPPORT FOR THE PRESENT
8 PAROLEE POPULATION, NEVER MIND AN ADDITIONAL NUMBER THAT WOULD
9 BE RELEASED UNDER THE PLAINTIFFS' SOUGHT ORDERS.

10 WHAT WE CONSISTENTLY HEARD FROM BOTH THE PLAINTIFFS'
11 EXPERTS, DR. GILLIGAN AND DR. KRISBERG, WAS UNIFORM. A
12 PRISONER RELEASE ORDER WILL ONLY BE SUCCESSFUL IF PROPERLY
13 DONE. THEY CONSISTENTLY SAID IT WOULD HAVE TO BE PROPERLY
14 DONE.

15 WHAT DOES THAT MEAN? THAT MEANS PROVIDING COMMUNITY
16 SUPPORT UPON RELEASE, DRUG PROGRAMS, JOB SKILL PROGRAMS,
17 HOUSING PROGRAMS. IN OTHER WORDS, THE VERY SOCIAL SERVICES
18 NETWORK THAT IS SO SHREDDED, SO FLOUNDERING NOW IN OUR PRESENT
19 ECONOMY WOULD HAVE TO BE BUILT UP. AND THE CREATION OF THAT
20 ADDITIONAL COMMUNITY SUPPORT FOR PAROLEES, EVEN WHEN CONSIDERED
21 BY THE EVER OPTIMISTIC GAIL BATAILLE, WOULD TAKE AT LEAST 18
22 MONTHS.

23 THE MENTALLY ILL INMATE WHO IS RELEASED WITHOUT
24 SUPPORT AND CARE, WITHOUT SUPPORT AND HOUSING AND JOB SKILLS
25 AND DRUG TREATMENT WILL NOT SUCCEED.

1 MISS BATAILLE NOTED AT LEAST A THIRD OF THE HOMELESS
2 PEOPLE WE SEE ON THE STREETS TODAY ARE MENTALLY ILL.

3 DR. GILLIGAN NOTED THE MENTALLY ILL ARE THE ONES WHO
4 GET PREYED UPON ON THE STREET BECAUSE THEY HAVE NO SUPPORT.
5 THEY GO TO THE EMERGENCY ROOM OR ARE USUALLY TAKEN TO THE
6 EMERGENCY ROOM WHEN THEY ARE DECOMPENSATING OR WHEN THEY ARE
7 ASSAULTED BY OTHERS.

8 THEY ARE PLACED IN COUNTY JAILS FOR VARIOUS REASONS.
9 AND THEN THEY ARE SIMPLY SOMETIMES FOUND DEAD ON THE STREETS.
10 ALL BECAUSE THEY DON'T HAVE SUPPORT MECHANISMS IN THE COMMUNITY
11 AT THIS TIME TO ENABLE THE CARE OF THESE MENTALLY ILL PAROLEES.

12 IN CONTRAST, THE MENTALLY ILL PAROLEES GET CARE WHILE
13 THEY'RE WITHIN THE DEPARTMENT OF CORRECTIONS. THEY GET
14 STABILIZED. THEY GET SHELTER. THEY GET MEDICATIONS.

15 DEFENDANTS RESPECTFULLY REQUEST THAT IN LIGHT OF
16 PLAINTIFFS' INABILITY TO ESTABLISH THE PRIMARY CAUSE OF ANY
17 CONSTITUTIONAL DEFICIENCIES THE MENTAL HEALTH CARE SYSTEM IS
18 ARISING FROM THE PRISON POPULATION AND BECAUSE OF THE ADVERSE
19 IMPACT ON THE COMMUNITY AND ON THE MENTALLY ILL BY ANY RELEASE
20 ORDER, THAT PLAINTIFFS' REQUEST SHOULD BE DENIED.

21 THANK YOU.

22 **JUDGE REINHARDT:** THANK YOU, COUNSEL.

23 THE COURT WILL TAKE A BRIEF AFTERNOON RECESS.

24 (WHEREUPON THERE WAS A RECESS IN THE PROCEEDINGS

25 FROM 2:55 UNTIL 3:16 P.M.)

1 **JUDGE REINHARDT:** ALL RIGHT.

2 **CLOSING ARGUMENT**

3 **MR. MITCHELL:** GOOD AFTERNOON. BILL MITCHELL FOR THE
4 DISTRICT ATTORNEY DEFENDANT INTERVENORS. I WOULD LIKE TO THANK
5 THE COURT FOR THIS OPPORTUNITY TO ADDRESS THE COURT AND TO MAKE
6 OUR POSITION KNOWN IN CLOSING IN THIS MATTER.

7 I'M NOT GOING TO ADDRESS THE ISSUES ALREADY ADDRESSED
8 BY DEFENDANTS' COUNSEL IN REGARDS TO WHETHER OR NOT THE
9 EVIDENCE HAS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT
10 OVERCROWDING IS A PRIMARY CAUSE OR THAT NO OTHER RELIEF WOULD
11 REMEDIATE THE CONSTITUTIONAL DEFICIENCIES.

12 IF THIS COURT DETERMINES THAT THE PLAINTIFFS HAVE MET
13 THEIR BURDEN OF PROOF, THAT OVERCROWDING IS A PRIMARY CAUSE OF
14 THE CONSTITUTIONAL VIOLATIONS AND THAT THERE ARE NO ALTERNATIVE
15 REMEDIES OTHER THAN A PRISONER RELEASE ORDER, THEN THE COURT
16 MUST CONSIDER AND GIVE SUBSTANTIAL WEIGHT TO THE IMPACT
17 EVIDENCE OF THE PROPOSED PRISONER RELEASE ORDERS.

18 THE PRISON LITIGATION REFORM ACT LIMITS RELIEF TO
19 THAT WHICH IS NECESSARY TO CORRECT A VIOLATION OF FEDERAL RIGHT
20 OF PARTICULAR PLAINTIFF OR PLAINTIFFS.

21 A PRISONER RELEASE ORDER THAT INVOLVES EARLY RELEASE
22 OF STATE PRISON INMATES, DIVERSION OF STATE PRISON-BOUND FELONS
23 OR THE SETTING OF A POPULATION CAP ON THE PRISON SYSTEM ARE ALL
24 OVERBROAD AND WILL HAVE SUBSTANTIAL ADVERSE IMPACTS ON PUBLIC
25 SAFETY IN THE OPERATION OF LOCAL CRIMINAL JUSTICE SYSTEMS.

1 **JUDGE REINHARDT:** WHAT WOULD NOT BE OVERBROAD IF WE
2 DETERMINE THAT THERE SHOULD BE A PRISONER RELEASE ORDER?

3 **JUDGE KARLTON:** IS THERE ANYTHING?

4 **MR. MITCHELL:** THAT WOULD NOT BE OVERBROAD?

5 **JUDGE KARLTON:** YEAH.

6 **MR. MITCHELL:** ONE SUGGESTION MIGHT BE TO DIRECT
7 ORDERS AT THE PLAINTIFF CLASS MEMBERS, HAVE THEM SEGREGATED
8 INTO FACILITIES WHERE THEIR CONSTITUTIONAL MEDICAL NEEDS AND
9 MENTAL HEALTH CARE NEEDS COULD BE MET AND THAT POPULATION CAPS
10 BE PLACED ON THOSE FACILITIES WHERE THOSE INMATES ARE HOUSED.

11 THAT WOULD BE NARROWLY DRAWN, TAILORED TO REMEDIATE
12 THE CONSTITUTIONAL RIGHTS OF THE AGGRIEVED PLAINTIFF CLASSES
13 AND WOULD NOT IMPACT THE GENERAL POPULATION. AND THE STATE
14 WOULD HAVE TO COME UP WITH A PLAN TO DEAL WITH THE
15 CONSTITUTIONAL VIOLATIONS FOUND BY THESE COURTS, PLATA AND
16 COLEMAN.

17 NOT DEALING WITH THE OVERCROWDING PLAGUING THE ENTIRE
18 CDCR SYSTEM, WHICH IN THE DISTRICT ATTORNEY INTERVENOR'S
19 POSITION IS NOT BEFORE THIS COURT.

20 **JUDGE REINHARDT:** I DON'T QUITE FOLLOW. COULD YOU
21 EXPLAIN AGAIN?

22 WHAT IF WE FOUND THAT OVERCROWDING WAS THE PRIMARY
23 CAUSE OF THE VIOLATION --

24 **MR. MITCHELL:** PRIMARY CAUSE OF THE DEFICIENCIES IN
25 HEALTHCARE AND MENTAL HEALTH CARE FOR THE PLAINTIFF CLASSES,

1 ORDER THE STATE TO SEGREGATE THOSE PLAINTIFF CLASS POPULATIONS
2 INTO SEPARATE FACILITIES AND HAVE CAPS PLACED ON THE NUMBER OF
3 THOSE PLAINTIFF CLASS THAT'S COULD BE PUT INTO THOSE
4 INSTITUTIONS.

5 **JUDGE HENDERSON:** PUT THE PHYSICAL HEALTH AND MENTAL
6 HEALTH PEOPLE IN SEPARATE FACILITIES?

7 **JUDGE KARLTON:** WELL, IN SOME INSTITUTIONS.

8 **MR. MITCHELL:** I ASSUME THEY WOULD BE.

9 **JUDGE REINHARDT:** I THOUGHT THAT EVERYBODY IS SUBJECT
10 TO THE -- OH, LET'S SAY THE PHYSICAL HEALTH PROBLEM.

11 **MR. MITCHELL:** IT'S MY UNDERSTANDING -- AND EXCUSE ME
12 FOR INTERRUPTING -- THAT THE PLATA CLASS DEALS WITH THOSE WITH
13 SEVERE OR SERIOUS MEDICAL ILLNESSES. AND COLEMAN DEALS WITH
14 SERIOUS SEVERE MENTAL HEALTH DISORDERS.

15 WE ARE NOT DEALING WITH GENERAL POPULATION INMATES
16 WHO ARE OTHERWISE HEALTHY OR HAVE THE FLU OR COLDS OR MINOR
17 INFECTIONS OF SOME SORT.

18 **JUDGE KARLTON:** WELL, THE PROBLEM AT LEAST FOR -- I
19 MEAN, IT'S NOT TRUE OF COLEMAN FOR OTHER REASONS, BUT WITH
20 PLATA IS THAT EVERY SINGLE INMATE IS POTENTIALLY -- CAN GET
21 SICK. WE ARE UNABLE PRESENTLY -- OR AT LEAST THE PLAINTIFFS
22 ARGUE, WE ARE UNABLE TO DELIVER ADEQUATE MEDICAL CARE FOR THEM
23 AND THERE IS NO WAY TO SEGREGATE THEM BEFOREHAND.

24 **MR. MITCHELL:** BUT ONCE THEY WERE IDENTIFIED BY THE
25 MEDICAL STAFF AT THE PARTICULAR PRISON THEY WERE AT AND IT

1 BECAME NECESSARY THAT THEY WERE NEEDED TO BE ATTENDED TO BY A
2 MORE EXPERIENCED OR PROFESSIONAL STAFF, THEY COULD BE
3 TRANSFERRED TO ONE OF THOSE INSTITUTIONS.

4 **JUDGE KARLTON:** I THINK YOU DON'T QUITE UNDERSTAND
5 WHAT THE PROBLEM IS HERE.

6 **JUDGE REINHARDT:** I'M A NEWCOMER TO THIS. SO
7 SOMEBODY GETS SERIOUSLY ILL. HE IS NOT IDENTIFIED, I THOUGHT,
8 IN THE TIMELY MANNER AND HE IS NOT TREATED IN A TIMELY MANNER
9 BECAUSE OF THE OVERCROWDING. IS THAT WRONG?

10 **MR. MITCHELL:** I KNOW WHEN I GET SERIOUSLY ILL, I GO
11 AND I USUALLY HAVE TO WAIT TO GET AN APPOINTMENT.

12 I MEAN, THINGS DON'T HAPPEN OVERNIGHT. IT TAKES
13 EVALUATION BY A NURSING STAFF AND PHYSICIAN'S ASSISTANTS AND
14 IDENTIFYING WHAT THE NATURE OF THE ILLNESS IS AND THEN IT'S
15 ATTENDED TO BY THE MEDICAL STAFF AS IT NEEDS TO BE ATTENDED TO.

16 AND THAT WAS A SUGGESTION OF SOMETHING MORE NARROWLY
17 TAILORED TO THE PLAINTIFF CLASSES. EARLY RELEASE, THE EARLY
18 RELEASE MEASURES BEING PROPOSED, WOULD ENDANGER PUBLIC SAFETY
19 BY INCREASING CRIME AND VICTIMIZATION IN THE COMMUNITIES.

20 THE EARLY RELEASE OF STATE PRISON INMATES PRIOR TO
21 THE EXPIRATION OF THEIR SENTENCE TERMS WILL RESULT IN THE
22 COMMISSION OF NEW CRIMES. THE EVIDENCE HAS SHOWN THAT. SOME
23 OF WHICH WILL BE VIOLENT AND SERIOUS FELONIES.

24 ACCORDING TO THE PLAINTIFFS' EXPERT, DR. JAMES
25 AUSTIN, 25 PERCENT OF THE PRISONERS THAT WOULD BE RELEASED

1 EARLY FROM PRISON WILL BE CAUGHT AND ARRESTED FOR NEW CRIMES
2 WITHIN THE FIRST FOUR MONTHS OF RELEASE.

3 A NUMBER OF NEW CRIMES THAT GO UNSOLVED --

4 **JUDGE REINHARDT:** WHENEVER THEY ARE RELEASED.

5 **MR. MITCHELL:** PARDON?

6 **JUDGE REINHARDT:** WHETHER THEY ARE RELEASED AT THE
7 END OF THEIR TERMS OR SOMEWHAT EARLIER.

8 **MR. MITCHELL:** THEY WILL COMMIT NEW CRIMES. YES,
9 THERE IS A RECIDIVISM RATE OF 25 PERCENT.

10 BUT DR. AUSTIN FOUND, AND HE TESTIFIED AND PUT IT IN
11 HIS REPORT, THAT THERE WILL BE A 25 PERCENT RECIDIVISM RATE IN
12 THAT FIRST FOUR MONTHS OF THAT EARLY RELEASE PERIOD.

13 AND THAT'S WHAT WE ARE TALKING ABOUT HERE. WILL
14 THERE BE AN IMPACT FROM THE COURT'S ORDER THAT PRISONERS BE
15 RELEASED EARLY?

16 **JUDGE REINHARDT:** WELL, LET'S SUPPOSE THEY ARE
17 RELEASED FOUR MONTHS LATER. IT WILL BE AN IDENTICAL IMPACT OR
18 WILL IT BE A DIFFERENT GROUP OF PEOPLE?

19 **MR. MITCHELL:** NO, IT WOULDN'T BE AN IDENTICAL IMPACT
20 BECAUSE THAT WOULD BE --

21 **JUDGE REINHARDT:** A DIFFERENT GROUP OF PEOPLE.

22 **MR. MITCHELL:** THAT WOULDN'T BE AN IMPACT
23 ATTRIBUTABLE TO THE COURT'S ORDER, BECAUSE THEY WOULD BE
24 GETTING OUT AT THE END OF THEIR TERMS.

25 WHAT THE COURT HAS TO TAKE INTO CONSIDERATION IS

1 WHETHER OR NOT ITS ORDER IS GOING TO HAVE AN IMPACT ON
2 INCREASING VICTIMIZATION IN THE COMMUNITIES. AND IF --

3 **JUDGE REINHARDT:** ALL RIGHT. HOLD ON. HOLD ON. I
4 WANT TO SEE IF THE FACTS ARE CORRECT.

5 THE IMPACT OF THE COURT ORDER WOULD BE THAT THERE
6 WOULD BE A DIFFERENT GROUP OF VICTIMS WITH THE SAME NUMBER OF
7 CRIMES.

8 **MR. MITCHELL:** ACCORDING TO DR. AUSTIN AND SOME OF
9 THE OTHER EXPERTS, YES. WE ARE ACCELERATING THE COMMISSION OF
10 CRIMES. YOU WANT TO CALL IT DIFFERENT VICTIMS. IT'S VICTIMS
11 THAT WOULD NOT BE VICTIMS BUT FOR THE EARLY RELEASE.

12 **JUDGE REINHARDT:** AND THE OTHER VICTIMS ARE SAVED.

13 **MR. MITCHELL:** NOT NECESSARILY. YOU ARE ASSUMING
14 THAT THEY GET CAUGHT FOR THEIR FIRST VICTIMS. AND THEY DON'T
15 ALWAYS GET CAUGHT, THAT'S WHAT THE EVIDENCE SHOWS.

16 **JUDGE REINHARDT:** NO, BUT SOMEWHERE THEY WILL GET
17 CAUGHT.

18 **MR. MITCHELL:** WE HOPE SO. IT JUST DOESN'T ALWAYS
19 HOLD TRUE.

20 **JUDGE REINHARDT:** IF IT TOOK THEM 12 MONTHS TO GET
21 CAUGHT AND THEN THEY'RE RELEASED IN DECEMBER, AND IT TOOK THEM
22 12 MONTHS TO GET CAUGHT BUT THEY ARE RELEASED IN JUNE, ALL WE
23 ARE TALKING ABOUT IS A DIFFERENT GROUP OF VICTIMS.

24 **MR. MITCHELL:** AND THE FACT REMAINS, THOUGH, IS THAT
25 THEY ARE OUT OF CUSTODY BECAUSE OF THE COURT ORDER AND CRIMES

1 ARE COMMITTED BY THEM DURING THAT TIME PERIOD. THAT'S
2 ATTRIBUTABLE TO THE COURT'S ORDER AND THAT'S THE IMPACT THAT
3 THE COURT HAS TO TAKE INTO CONSIDERATION.

4 **JUDGE REINHARDT:** THE IMPACT IS THAT A DIFFERENT
5 GROUP OF VICTIMS WILL EXIST. THE SAME NUMBER OF CRIMES WILL
6 OCCUR, BUT THEY WILL BE OUT EARLIER COMMITTING THOSE CRIMES.

7 **JUDGE HENDERSON:** THE IMPACT OF TIMING.

8 **MR. MITCHELL:** I THINK THERE IS A DIFFERENCE, YES.
9 I THINK THERE IS AN INCREASE IN CRIME. IT'S STATISTICALLY
10 INSIGNIFICANT INCREASE IN CRIME, ACCORDING TO DR. AUSTIN, BUT
11 STILL AN INCREASE IN CRIME.

12 THE 1986 STUDY THAT DR. KRISBERG AND DR. AUSTIN BOTH
13 PARTICIPATED IN SHOWED AN INCREASE IN CRIME. ALTHOUGH WHEN YOU
14 COMPARE IT TO THE OVERALL CRIME RATE IN THE COMMUNITY, THE
15 OVERALL NUMBER OF CRIMES, THEY CALL IT STATISTICALLY
16 INSIGNIFICANT.

17 BUT IT'S NOT INSIGNIFICANT TO THOSE VICTIMS, THE ONES
18 WHO SUFFER THE 23 MURDERS, THE 212 ROBBERIES.

19 **JUDGE REINHARDT:** THOSE 23 MURDERS WOULD OCCUR FOUR
20 MONTHS LATER.

21 **MR. MITCHELL:** WELL, THAT'S SPECULATION, YOUR HONOR.
22 I WOULD SUGGEST THAT'S SPECULATION.

23 **JUDGE REINHARDT:** WHAT YOU'RE SAYING, EVERYTHING IS
24 SPECULATION.

25 **MR. MITCHELL:** NO. THOSE ARE ACTUAL CRIMES THAT ARE

1 COMMITTED. WE KNOW THEY ARE COMMITTED BECAUSE WE HAVE ACTUAL
2 VICTIMS, ATTRIBUTABLE ACTIONS TO INMATES THAT ARE RELEASED
3 EARLY.

4 **JUDGE REINHARDT:** WE TALK ABOUT WHAT THESE PRISONERS
5 WOULD DO. THAT'S -- WHAT HAPPENED BEFORE MAY NOT BE
6 SPECULATION. BUT WHAT HAPPENED BEFORE IS NOT SPECULATION, THE
7 23 VICTIMS.

8 WHETHER THERE WERE A DIFFERENT SET OF 23 VICTIMS FOUR
9 MONTHS LATER MAY BE SPECULATION. WHAT'S GOING TO HAPPEN WITH
10 THESE PARTICULAR PRISONERS WHO WERE RELEASED FOUR MONTHS
11 EARLIER IS ALSO SPECULATION.

12 WE JUST HAVE TO SPECULATE. IF WE THINK THAT ANYBODY
13 THAT GETS OUT -- IN THEORY EVERYONE WHO GETS OUT IS GOING TO
14 COMMIT 12 CRIMES. SO WHETHER THEY GET OUT IN JANUARY AND
15 COMMIT 12 CRIMES OR THEY GET OUT IN JUNE AND COMMIT 12 CRIMES,
16 THEY ARE STILL GOING TO COMMIT 12 CRIMES.

17 **MR. MITCHELL:** EXCEPT THE CRIMES THAT THEY COMMIT
18 WHEN YOU LET THEM OUT IN JANUARY ARE ATTRIBUTABLE TO THE
19 COURT'S PRISONER RELEASE ORDER.

20 **JUDGE REINHARDT:** NO. WHAT'S ATTRIBUTABLE IS THEY
21 OCCUR EARLIER. THESE 12 VICTIMS WOULD NOT HAVE BEEN VICTIMS,
22 BUT THE ONES IN JUNE WHO WOULD HAVE BEEN THE VICTIMS ARE LUCKY
23 AND THEY ARE NOT GOING TO BE THE VICTIMS.

24 **JUDGE KARLTON:** OF COURSE, SOME OF THOSE PEOPLE MAY
25 BE THE VICTIMS IN ANY EVENT. I MEAN, THE GUY WHO KILLS HIS

1 WIFE, KILLS HIS WIFE IN JUNE OR SEPTEMBER WHENEVER HE GETS OUT.

2 **MR. MITCHELL:** I THINK MINIMIZING AND RATIONALIZING
3 THAT CRIMES LIKE THIS WITH OTHER VICTIMS WILL BE COMMITTED
4 ANYWAY AT A LATER TIME WHEN THEY GET OUT IS SIMPLY THAT. IT'S
5 MINIMIZING AND RATIONALIZING.

6 THE CRIME THAT THE STUDIES HAVE SHOWN WILL ACTUALLY
7 OCCUR; THAT CRIMES WILL BE COMMITTED DURING THAT EARLY RELEASE
8 WINDOW, AND THAT HAS TO BE RECOGNIZED AND TAKEN INTO
9 CONSIDERATION. THOSE VICTIMS ARE REAL VICTIMS.

10 **JUDGE REINHARDT:** I THINK WE'VE HAD THIS DISCUSSION
11 THROUGHOUT THE TRIAL.

12 **MR. MITCHELL:** WE HAVE.

13 **JUDGE REINHARDT:** WE ALL UNDERSTAND EACH OTHER'S
14 VIEWS.

15 **MR. MITCHELL:** IN FACT, THE PLAINTIFFS' EXPERTS HAVE
16 STATED THAT ALTHOUGH THE PRISON SYSTEM DIRECTLY BENEFITS FROM
17 LOWERED PRISON POPULATIONS, THE PUBLIC ALSO SUFFERS THE
18 INCREASED EFFECTS OF ACCELERATED PRISON RELEASES THAT, IN TURN,
19 CAN JEOPARDIZE PUBLIC SAFETY.

20 THOMAS HOFFMAN FROM CDCR, ADULT PAROLE OPERATIONS,
21 TESTIFIED THAT 4 PERCENT OF THE GROUP OF LOW RISK PAROLEES WHO
22 WOULD BE LET OUT ON EARLY RELEASE ARE GOING TO COMMIT VIOLENT
23 CRIMES.

24 SO WE ARE GOING TO HAVE NOT ONLY COMMISSION OF
25 25 PERCENT OF THOSE RELEASED EARLY, BUT 4 PERCENT OF THOSE,

1 THAT GROUP, AN ESTIMATE BY CDCR'S STATISTICIAN INDICATED THAT
2 4 PERCENT WOULD BE VIOLENT CRIMES. AND THIS WAS BORNE OUT IN
3 THE 1986 STUDY.

4 **JUDGE REINHARDT:** DID HE SAY HOW MANY WOULD COMMIT
5 CRIMES IF THEY WERE LET OUT AT THE END OF THE TERM INSTEAD OF
6 FOUR MONTHS EARLIER?

7 **MR. MITCHELL:** SAME STATISTICS APPLY.

8 AND IN 1986 IN THE ILLINOIS STUDY, THEY SHOWED THAT
9 OUT OF 21,000 INMATES, WHICH IS HALF OF WHAT THE PLAINTIFFS ARE
10 SUGGESTING SHOULD BE RELEASED IN THIS INSTANCE, WITHIN THAT 90
11 DAYS THAT THEY WERE RELEASED EARLY, THERE WERE 4500 NEW
12 ARRESTS, WHICH EQUATED TO, IN ONE ESTIMATE, OF OVER 30,000 NEW
13 CRIMES; BUT 23 HOMICIDES, 32 RAPES, 681 ROBBERIES, 262 ARSONS
14 AND OVER 2400 BURGLARIES ATTRIBUTABLE TO EARLY RELEASE
15 PROGRAMS.

16 DR. AUSTIN, THE PLAINTIFFS' EXPERT, TESTIFIED THAT
17 EARLY RELEASE PROGRAMS ARE ONLY A SHORT-TERM REMEDY FOR
18 OVERCROWDING AND IT'S NOT A POLICY THAT HE ENDORSES. HE
19 SUGGESTS THAT OTHER MEASURES SHOULD BE USED TO LOWER THE PRISON
20 POPULATION.

21 **JUDGE REINHARDT:** LIKE WHAT?

22 **MR. MITCHELL:** PARDON?

23 **JUDGE REINHARDT:** LIKE WHAT?

24 **MR. MITCHELL:** THERE'S PROGRAMS SUCH AS THE SB-618
25 RECIDIVISM REDUCTION PROGRAM THAT'S TAKING PLACE IN SAN DIEGO

1 THAT COULD BE IMPLEMENTED STATE-WIDE. THAT WOULD EFFECTIVELY
2 LOWER THE PRISON POPULATION BY KEEPING PEOPLE FROM COMMITTING
3 NEW CRIMES BY OFFERING --

4 **JUDGE KARLTON:** CAN WE ORDER THE STATE TO DO THAT?
5 SAY, STOP WHATEVER ELSE YOU ARE DOING. EVERY COUNTY IN THE
6 STATE OF CALIFORNIA IS TO EMULATE THE SAN DIEGO PROGRAM. DO WE
7 HAVE THE POWER TO DO THAT?

8 **MR. MITCHELL:** I THINK THAT THE COURT CAN ORDER CDCR
9 TO IMPLEMENT THOSE TYPES OF PROGRAMS, YES, BECAUSE IT'S A
10 PRISONER RELEASE ORDER, BECAUSE IT INDIRECTLY LOWERS THE NUMBER
11 OF INMATES GOING INTO PRISON.

12 **JUDGE HENDERSON:** CAN WE ORDER THE STATE TO PAY FOR
13 IT?

14 **JUDGE KARLTON:** AND ORDER THE STATE TO PAY FOR IT?

15 **MR. MITCHELL:** WELL, I THINK IF THE COURT ORDERS CDCR
16 TO IMPLEMENT THOSE PROGRAMS UNDER THE PRISONER RELEASE ORDER,
17 IT WOULD BE INCUMBENT UPON THE STATE TO FUND THOSE PROGRAMS,
18 YES.

19 I DON'T THINK THE COURT'S ORDERING ADDITIONAL
20 FUNDING, JUST ORDERING THE STATE TO ENGAGE IN A PARTICULAR
21 PROGRAM, SUCH AS INCREASING CONDUCT CREDITS.

22 **JUDGE KARLTON:** COUNTIES ARE GOING TO TELL US THAT IF
23 WE DO THAT, IT'S GOING TO BE AN UNFUNDED MANDATE AND THEY DON'T
24 HAVE THE FUNDS TO TAKE CARE OF IT.

25 **MR. MITCHELL:** CDCR WOULD REALIZE A SAVINGS IN FUNDS

1 BY THE LIMITED NUMBER, LESSER NUMBER OF INMATES GOING TO
2 PRISON. SO THERE WOULD BE FUNDING THERE FOR IT.

3 **JUDGE KARLTON:** THE ONLY PROBLEM WITH THAT IS THE
4 STATE IS BROKE AND ANY DOLLAR THAT THEY SAVE, THEY ARE GOING TO
5 SAY WE NEED TO REDUCE THE DEFICIT.

6 **JUDGE REINHARDT:** YOU KNOW, IT'S AN INTERESTING LEGAL
7 QUESTION. ONE OF THE THINGS THAT I WOULD LIKE TO KNOW THE
8 ANSWER TO IS TO WHAT EXTENT WE CAN ORDER THE STATE TO EXPEND
9 FUNDS FROM -- EITHER IN GENERAL TO CONDUCT PROGRAMS OR FROM ANY
10 SAVINGS THEY MAKE IN REDUCING PRISON POPULATION?

11 AND I WOULD APPRECIATE ANY LEGAL AUTHORITY ANYBODY
12 HAS ON THAT POINT.

13 **JUDGE KARLTON:** AS BEST I CAN TELL, THE FINDINGS OF
14 FACT AND CONCLUSIONS OF LAW PROPOSED BY EVERYBODY DOES NOT
15 ADDRESS THE POWER OF THE COURT TO DO THOSE THINGS, AND THAT IS
16 A PROBLEM FOR US AS TO WHAT WE CAN DO. I MEAN, I KNOW IT'S A
17 LEGAL PROBLEM THAT WE'VE GOT TO SOLVE.

18 **JUDGE REINHARDT:** WELL, WE MAY ASK FOR YOUR HELP IN
19 SOLVING THAT.

20 **JUDGE KARLTON:** WE MAY. WE MAY.

21 **JUDGE REINHARDT:** THE STATE MAY AGREE THAT WE CAN
22 ORDER THEM TO SPEND MONEY OR EVEN SPEND TO INCREASE ITS BUDGET.
23 IF THEY SAY THAT, THAT WOULD BE VERY HELPFUL.

24 **MR. MITCHELL:** THE DIVERSION OF STATE PRISON-BOUND
25 INMATES SUGGESTED BY PLAINTIFFS CONCERNS, THE 24 MONTHS OF LESS

1 CUSTODY, SUPERVISION OR PROGRAMS IN THE LOCAL COMMUNITY.
2 WITHOUT INCREASED FUNDING AND SUPPORT OF SUCH ALTERNATIVES WILL
3 RESULT IN THE COMMISSION OF NEW CRIMES IN LOCAL COMMUNITIES AND
4 INCREASED RECIDIVISM.

5 THE DEFENDANTS THAT FALL INTO THE CATEGORIES THAT
6 IT'S SUGGESTED ARE ELIGIBLE FOR THESE LOW RISK OR NON-SERIOUS
7 OFFENDERS BE COMMITTED TO PROBATIONARY TERMS RATHER THAN
8 PROBATION ALL HAVE LONG CRIMINAL RECORDS AND CRIMINAL BEHAVIOR.

9 THE DISTRICT ATTORNEY INTERVENORS READ IN THE
10 TESTIMONY OF DISTRICT ATTORNEY DUMANIS FROM SAN DIEGO COUNTY
11 AND DISTRICT ATTORNEY PACHECO FROM RIVERSIDE COUNTY.

12 ALMOST WITHOUT EXCEPTION, THE NON-SERIOUS,
13 NON-VIOLENT, NON-SEX OFFENDER DEFENDANTS THAT ARE SENT TO
14 PRISON FROM THOSE COUNTIES AND FROM MOST COUNTIES IN THE STATE
15 OF CALIFORNIA HAVE ALREADY FAILED ON PROBATION THREE, FOUR,
16 FIVE, SIX TIMES AND HAVE NUMEROUS FELONY CONVICTIONS.

17 THESE ARE ONES, INDIVIDUALS, DEFENDANTS THAT ARE NOT
18 AMENABLE TO SUPERVISION OR TREATMENT IN THE LOCAL COMMUNITIES.
19 TO SUGGEST THAT THIS GROUP IS NOW ELIGIBLE OR SUITABLE FOR
20 DIVERSION IS MERELY DUMPING ON THE COUNTIES THAT WHICH PROPERLY
21 BELONGS TO THE STATE.

22 **JUDGE REINHARDT:** WHAT HAPPENS TO THEM IF THEY ARE
23 NOT DIVERTED?

24 **MR. MITCHELL:** THEY GO TO PRISON.

25 **JUDGE REINHARDT:** FOR HOW LONG?

1 **MR. MITCHELL:** SOMETIMES 24 MONTHS, ACCORDING TO
2 THIS, WHICH COULD BE UP TO FOUR YEARS. 24 MONTHS IS ACTUAL
3 TIME.

4 **JUDGE REINHARDT:** WHAT'S THE GENERAL PRACTICE OF
5 THESE PEOPLE THAT WE ARE CONCERNED ABOUT? WHAT WOULD YOU
6 SAY -- HOW LONG WOULD THEY BE SENT TO PRISON FOR?

7 **MR. MITCHELL:** WELL, I KNOW THAT --

8 **JUDGE REINHARDT:** THE PRACTICAL REALITY, THE CLASS
9 YOU ARE TALKING ABOUT, WHAT ARE THEY AS AN AVERAGE SENT TO
10 PRISON FOR?

11 **MR. MITCHELL:** FOUR YEARS OR LESS.

12 **JUDGE REINHARDT:** THE AVERAGE?

13 **MR. MITCHELL:** YES.

14 **JUDGE REINHARDT:** FOUR YEARS OR LESS?

15 **MR. MITCHELL:** OUT OF 4200 INMATES SENT TO PRISON
16 FROM RIVERSIDE COUNTY IN 2007, 3200 WERE FOUR YEARS OR LESS FOR
17 NON-SERIOUS, NON-VIOLENT, NON-SEX OFFENSES. 3200, FOUR YEARS
18 OR LESS.

19 THE ACTUAL TIME THEY ARE SERVING IS TWO YEARS ON A
20 FOUR-YEAR PRISON SENTENCE. SO THEY ARE IN THERE FOR
21 APPROXIMATELY 18 MONTHS TO TWO YEARS.

22 **JUDGE REINHARDT:** THEY KEEP GOING DOWN. YOU SAID
23 FOUR YEARS, NOW WE ARE DOWN TO TWO, NOW 18 MONTHS.

24 **MR. MITCHELL:** I'M TALKING ACTUAL MONTHS.

25 THERE IS A HUGE NUMBER IN OUR PRISON SYSTEM, AND WE

1 HEARD THE EVIDENCE ON THAT, THAT IS CHURNING IN AND OUT, BUT
2 THERE IS NO PROGRAMS AT THE LOCAL LEVEL TO DEAL WITH THEM.

3 **JUDGE KARLTON:** AND THERE WERE NO PROGRAMS AT THE
4 PRISON LEVEL BECAUSE THERE IS NO PLACE --

5 **MR. MITCHELL:** CORRECT. AND THAT'S WHY WE'VE COME UP
6 WITH THE PROGRAM LIKE THE SB-618 PROGRAM TO TRY AND STOP THAT
7 CHURNING, TRY AND STOP THAT RECIDIVISM FROM CONTINUALLY
8 OCCURRING.

9 AND THE DISTRICT ATTORNEYS ARE WORKING TO IMPLEMENT
10 THAT IN OTHER COUNTIES DESPITE WHAT THIS COURT ORDERS AND
11 WHETHER IT INVOLVES THAT OR NOT.

12 **JUDGE HENDERSON:** YOU KNOW, I'M RETURNING BECAUSE IT
13 SEEMS CRITICAL TO ME.

14 I WAS VERY IMPRESSED WITH THE PROGRAM. SO IT'S LIKE
15 ASKING US TO DO SOMETHING THAT WON'T HAPPEN. THAT'S MY
16 CONCERN. I DON'T KNOW WHAT TO DO. IF I ADVOCATE THIS AND SAY
17 WONDERFUL, BUT THE MONEY IS NOT THERE AND IT'S NOT GOING TO BE
18 THERE, IS IT A REMEDY AT ALL OR IS IT ILLUSIONARY?

19 **MR. MITCHELL:** I DON'T KNOW THAT CDCR IS OPPOSED TO
20 IT. I KNOW THAT I SAW IT AS AN ALTERNATIVE IN THE DEFENDANTS'
21 CONCLUSIONS OF LAW AND FINDINGS OF FACT.

22 **JUDGE KARLTON:** BUT THE REALITY -- EXCUSE ME, SIR.
23 THE REALITY IS THAT THE STATE SAYS THREE COUNTIES CAN DO THIS
24 EXPERIMENT AND ONLY ONE HAS DONE IT. WHAT DO WE MAKE OF THAT?
25 WE ARE TALKING ABOUT STATE-WIDE AND ALL THAT THAT WOULD IMPLY.

1 **MR. MITCHELL:** IT'S THE SAME PROBLEM AS
2 JUDGE HENDERSON NOTED IN HIS FINDINGS OF FACT THAT LED TO THE
3 APPOINTMENT OF THE RECEIVER. IT'S A LACK OF LEADERSHIP.

4 AND THERE WAS A LEADER IN SAN DIEGO THAT TOOK IT UPON
5 HERSELF TO GET IT STARTED AND NOW IT'S PROVEN THAT IT WORKS.
6 AND NOW IT'S SOMETHING THAT OTHER DISTRICT ATTORNEYS ARE
7 LOOKING INTO GETTING IMPLEMENTED IN THEIR COUNTIES.

8 SO IT IS A LACK OF LEADERSHIP, A LACK OF INITIATIVE
9 TO GET THINGS OFF THE GROUND AND STARTED.

10 **JUDGE REINHARDT:** IMPLEMENTED WITH STATE FUNDS.

11 **MR. MITCHELL:** IN SAN DIEGO IT'S IMPLEMENTED WITH
12 STATE FUNDS, YES. CDCR FUNDS IT.

13 **JUDGE REINHARDT:** AND YOU WANT LEADERSHIP ON A STATE
14 LEVEL. ARE YOU A CANDIDATE FOR GOVERNOR?

15 **MR. MITCHELL:** I DON'T KNOW THAT WE NEED TO GET INTO
16 THAT AT THIS POINT.

17 **JUDGE REINHARDT:** CAN WE ORDER LEADERSHIP ON A STATE
18 LEVEL? IT WOULD BE WONDERFUL.

19 **MR. MITCHELL:** AND I'M NOT ADVOCATING THAT THIS COURT
20 MAKE THAT ORDER REGARDING SB-618.

21 THE COURT WONDERED WHAT TYPE OF PROGRAM WOULDN'T
22 INVOLVE ADVERSE IMPACTS ON PUBLIC SAFETY, AND THAT'S ONE THAT
23 DOES NOT HAVE ADVERSE IMPACTS ON PUBLIC SAFETY.

24 **JUDGE REINHARDT:** I DON'T THINK THAT WE CAN SAY IT
25 WOULDN'T HAVE AN IMPACT ON PUBLIC SAFETY IF WE HAD LEADERSHIP,

1 THEREFORE, WE ARE GOING TO DO THIS. WE HAVE TO TALK ABOUT
2 WHAT'S REALLY GOING TO HAPPEN.

3 IS THE STATE REALLY GOING TO GIVE US THE MONEY? IF
4 THE STATE WILL COME INTO COURT AND PUT UP A BOND OR SOMEHOW
5 SAY, HERE, WE'VE AUTHORIZED THE MONEY FOR THESE PROGRAMS.
6 THAT'S A DIFFERENT SITUATION. BUT TO SAY THE STATE, IF IT ONLY
7 HAD LEADERSHIP, COULD SOMEHOW AUTHORIZE THE PROGRAM WE ALL KNOW
8 IT'S NOT GOING TO DO, THAT DOESN'T HELP.

9 **JUDGE KARLTON:** I MEAN, AB900 HAS NOT BEEN CURED IN,
10 WHAT, FOUR YEARS? I'M MAKING THAT UP. TWO YEARS. IT'S NOT
11 LIKE PEOPLE DON'T HAVE GOOD IDEAS. FOR SOME REASON NOTHING
12 HAPPENS. WELL, ONE THING HAPPENS. WE GET MORE AND MORE PEOPLE
13 IN PRISON.

14 BUT, YOU KNOW -- AND THE ARGUMENT ABOUT LETTING THESE
15 FOLKS OUT IS GOING TO CAUSE A PROBLEM, LAW ENFORCEMENT PROBLEM.
16 NOBODY DISPUTES, BEGINNING WITH THE DEFENDANT, THAT THE PRISONS
17 ARE PRESENTLY CRIMINOGENIC.

18 SO WHEN WE SEND THESE PEOPLE TO 18 MONTHS, THEY GO IN
19 AS DRUG USERS OR THEY'VE BOOSTED A CAR OR GOD KNOWS WHAT, WHEN
20 THEY COME OUT THEY'RE GOING TO DO VIOLENT CRIMES.

21 ONE THING, APPARENTLY, IS TRUE. AND, REALLY, THIS IS
22 AN IMPORTANT THING TO BE TALKING TO THE DISTRICT ATTORNEYS
23 ABOUT. IF WHAT WE ARE DOING CLEARLY ENDANGERS PUBLIC SAFETY,
24 AND THAT IS APPARENTLY THE UNDISPUTED EVIDENCE, DON'T WE HAVE
25 TO DO SOMETHING DIFFERENT?

1 **MR. MITCHELL:** AGREED. SOMETHING NEEDS TO BE DONE.
2 AND FOR THE PART -- IF YOU ARE REFERRING TO, DOES THIS COURT
3 NEED TO DO SOMETHING DIFFERENT, THAT THE STATE NEEDS TO DO
4 SOMETHING DIFFERENT. WITH THE BUDGET CONSTRAINTS AND THE
5 RECIDIVISM AND INCREASED CRIME, YEAH, THE STATE DOES NEED TO DO
6 SOMETHING DIFFERENT.

7 **JUDGE KARLTON:** AND IF THE STATE HAS BEEN GIVEN YEARS
8 AND YEARS AND THE ONLY THING THAT THEY HAVE DONE IS PERMIT THE
9 PRISON SYSTEM TO GROW COMPLETELY OUT OF CONTROL, THEN WHAT?

10 I MEAN, THERE IS NO EVIDENCE, THERE IS NO EVIDENCE
11 THAT I CAN TELL OF -- WITH ALL DUE RESPECT TO MISS TILLMAN'S
12 SUGGESTION OTHERWISE, THERE IS NO EVIDENCE THAT THE STATE,
13 WITHOUT FEDERAL COURT PRODDING, WILL DO ANYTHING EXCEPT -- I
14 MEAN, AND THERE'S A PROBLEM OF POLITICAL WILL. NOBODY WANTS TO
15 SAY, OH, I'M SOFT ON CRIME. ALL THOSE REASONS.

16 YOU KNOW, AND JUST TO ECHO JUDGE REINHARDT, THERE ARE
17 AT LEAST SOME POLITICIANS WHO SAY, LET THE COURTS ORDER US TO
18 DO SOMETHING AND THEN WE WON'T BE RESPONSIBLE FOR ANYTHING.
19 YOU KNOW, WE WILL JUST TO HAVE TO DO IT.

20 WHAT CAN WE DO UNDER THESE CIRCUMSTANCES?

21 **MR. MITCHELL:** I THINK THE COURT'S POWER IS FURTHER
22 CONSTRAINED AND LIMITED BY THE FACT THAT ANY ORDER HAS TO BE
23 NARROWLY TAILORED TO RE MEDIATING THE CONSTITUTIONAL VIOLATIONS
24 OF THE TWO PLAINTIFF CLASSES AND NOT CURING ALL THE ILLS OF THE
25 PRISON SYSTEM.

1 **JUDGE KARLTON:** YOU ARE ABSOLUTELY RIGHT. YOU ARE
2 ABSOLUTELY RIGHT. THIS IS -- YOU KNOW, IT'S NOT A -- WE DON'T
3 HAVE A GENERAL WRIT TO GO AND CURE EVERY PROBLEM IN THE WORLD.

4 **JUDGE REINHARDT:** MAYBE YOU ARE RIGHT. ALL WE CAN DO
5 IS ISSUE A PRISONER RELEASE ORDER AND NOT DO THE KINDS OF
6 THINGS YOU ARE TALKING ABOUT, LIKE SEEING THESE PROGRAMS ARE
7 INSTITUTED.

8 **JUDGE KARLTON:** MAYBE THE ANSWER IS IF WE ORDER THE
9 STATE, TELL THEM, LOOK, THERE IS A CAP -- AND I DON'T KNOW WHAT
10 THAT CAP WOULD BE. I SUSPECT THERE IS SOME DISAGREEMENT AMONG
11 US. BUT BE THAT AS IT MAY, AND WE SAY TO THE STATE, THIS IS
12 THE NUMBER OF PEOPLE THAT YOU CAN KEEP IN YOUR PRISONS UNLESS
13 YOU BUILD MORE PRISONS, AND THEN THE STATE WILL BE REQUIRED TO
14 TAKE THE BIT BY THE -- I GUESS YOU DON'T TAKE THE BIT BY THE
15 HORNS.

16 **MR. MITCHELL:** THE HORSE BY THE BIT.

17 **JUDGE KARLTON:** TO TAKE THE BIT AND SAY, THIS IS WHAT
18 WE ARE GOING TO DO. MAYBE THAT'S THE BEST THAT WE CAN DO. AS
19 BAD AS THAT MIGHT BE, MAYBE THAT'S THE BEST WE CAN DO.

20 **MR. MITCHELL:** THAT LEAVES IT UP TO THE STATE TO
21 FIGURE OUT HOW IT'S GOING TO FIX THE PROBLEM.

22 THE LAST POINT I WANTED TO MAKE IS REGARDING THE CAP
23 ON THE PRISON POPULATION IN GENERAL. AND THE EVIDENCE THAT WAS
24 PRESENTED, FOR INSTANCE, AS IN -- IN RIVERSIDE COUNTY JAIL,
25 LIKE MANY OTHER COUNTY JAILS, ALREADY HAVE POPULATION CAPS

1 FORCING THE LOCAL AUTHORITIES TO RELEASE INMATES PRIOR TO THE
2 COMPLETION OF THEIR COURT-ORDERED CUSTODY AND TO RELEASE
3 UNQUALIFIED PRETRIAL DETAINEES WITHOUT BAIL.

4 STATISTICS HAVE SHOWN THAT THIS GROUP OF JAIL INMATES
5 HAS A RECIDIVISM RATE. IN RIVERSIDE IT WAS OVER 28 PERCENT.
6 SHERIFF HENNESSY TESTIFIED THAT EARLY RELEASE MEASURES IN HIS
7 JAIL DIDN'T RESULT IN ANY INCREASED CRIME, BUT ON
8 CROSS-EXAMINATION IT WAS POINTED OUT -- HE POINTED OUT, WELL,
9 THEY DON'T KEEP RECORDS OF THE REARRESTS OF THOSE PEOPLE
10 ANYWAY. SO HIS TESTIMONY REGARDING THAT MATTER, IT WAS REALLY
11 SOMEWHAT WITHOUT MERIT.

12 **JUDGE REINHARDT:** LET ME ASK YOU A QUESTION. YOU
13 HAVE A CAP IN THE COUNTY JAIL?

14 **MR. MITCHELL:** YES.

15 **JUDGE REINHARDT:** WHAT'S THE ALTERNATIVE TO THE CAP?
16 WOULD YOU SAY THAT IF YOU GET TO THE POINT WHERE YOU'VE GOT
17 FIVE PEOPLE IN A CELL BUILT FOR ONE, OR GETS TO BE 10 PEOPLE,
18 AT SOME POINT DOESN'T THERE HAVE TO BE A CAP?

19 **MR. MITCHELL:** AT SOME POINT THE FACILITIES CAN ONLY
20 HOLD SO MANY, WHETHER YOU HAVE HOT BUNKING OR BOATS INSTEAD OF
21 BEDS.

22 **JUDGE REINHARDT:** WHERE THE FACILITY CAN'T FUNCTION.

23 **JUDGE KARLTON:** THAT'S WHERE WE ARE NOW WITH THE
24 PRISON SYSTEM, AS BEST I CAN TELL. WHAT DO WE DO?

25 **MR. MITCHELL:** THE COURT HEARD FROM THE DISTRICT

1 ATTORNEYS THAT TESTIFIED IN THIS CASE. THEY SHARE YOUR
2 FRUSTRATION.

3 **JUDGE KARLTON:** THAT'S EASY. I DON'T MEAN THAT
4 BADLY. I MEAN, YOU KNOW --

5 **JUDGE REINHARDT:** THIS MIGHT BE AN IMPOSSIBLE
6 PROBLEM, BUT HERE WE ARE WITH AN IMPOSSIBLE PROBLEM.
7 OBVIOUSLY, AT SOME POINT THERE HAS TO BE A CAP ON THE PRISON
8 POPULATION, MAYBE FIVE TIMES AS MUCH AS WE NOW HAVE.

9 BUT IN THEORY THERE HAS TO BE A CAP AT SOME POINT.
10 IF -- YOU CAN'T JUST KEEP PUTTING PEOPLE INTO PRISON FOREVER.
11 YOU'VE GOT TO LIMIT IT TO --

12 **MR. MITCHELL:** WELL, I THINK WHAT'S BEFORE THIS COURT
13 IS THE CONSTITUTIONAL HEALTHCARE AND MENTAL HEALTH CARE AND --

14 **JUDGE REINHARDT:** YOU SAID -- WE ARE TALKING ABOUT
15 ASSUMING THAT. YOU WERE SAYING, ASSUMING WE REACHED A POINT
16 WHERE IT'S THE -- WHERE IT IS THE PRIMARY CAUSE, WHERE THERE IS
17 NO OTHER REMEDY. NOW WHAT DO YOU DO?

18 **JUDGE KARLTON:** NOW WHAT DO YOU DO?

19 **JUDGE REINHARDT:** I DON'T KNOW. YOU SAY, WELL, DON'T
20 YOU DO ANYTHING THAT'S GOING TO CAUSE AN IMPACT ON CRIME. IF
21 YOU DON'T DO ANYTHING, WHAT?

22 **JUDGE KARLTON:** IT'S GOING TO CAUSE AN IMPACT ON
23 CRIME.

24 **MR. MITCHELL:** WELL, IT COMES DOWN TO FUNDING AND IT
25 COMES DOWN TO TIME TO EMPLOY PROGRAMS THAT WILL NOT RESULT IN

1 ADVERSE IMPACTS ON PUBLIC SAFETY IN THE CORRECTIONAL JUSTICE
2 SYSTEM.

3 **JUDGE REINHARDT:** AND WHERE DO YOU GET FUNDING FROM
4 THAT? WHAT'S GOING ON IN THE COUNTRY? WHAT'S GOING ON IN THE
5 STATE, THE BUDGET? WHEN CAN YOU EXPECT FUNDING FOR THOSE
6 PROGRAMS?

7 **MR. MITCHELL:** THERE IS FUNDING. IT'S JUST A
8 QUESTION OF PRIORITIES AND WHERE THE MONEY GETS ALLOCATED.
9 THERE IS MONEY THERE FOR PROGRAMS. THERE'S MONEY THERE FOR
10 SERVICES AND IT'S A QUESTION OF WHERE THE STATE ALLOCATES IT.

11 **JUDGE REINHARDT:** IN THE PRISON PROJECT OR ARE WE
12 GOING TO GET FUNDING ELSEWHERE? WE ARE NOT GOING TO CLOSE THE
13 SCHOOLS.

14 **MR. MITCHELL:** THERE'S RESOURCES AVAILABLE AND IT'S A
15 QUESTION OF WHERE THEY GET ALLOCATED. THOSE ARE DECISIONS THAT
16 ARE MADE IN THE LEGISLATURE AND APPROPRIATIONS. AND DECISIONS
17 HAVE TO BE MADE OF WHAT'S MORE IMPORTANT, WHAT DO WE HAVE TO
18 DO?

19 IT'S OFTEN BEEN SAID THAT THE NUMBER ONE PRIORITY FOR
20 THE STATE AND FOR THE LOCAL GOVERNMENTS IS ENSURING PUBLIC
21 SAFETY. AND IF THAT'S TRUE, THEN THOSE FUNDING PRIORITIES HAVE
22 TO BE MADE.

23 **JUDGE REINHARDT:** THAT'S AN ARGUMENT YOU HAVE TO MAKE
24 TO THE GOVERNOR AND THE LEGISLATURE, I WOULD THINK. WHY DON'T
25 YOU COME BACK AND TELL US THAT YOU HAVE GOTTEN THEM -- YOU

1 PERSUADED THEM THAT THEY OUGHT TO DIVERT MONEY FROM THE
2 SCHOOLS. THEY OUGHT TO DIVERT MONEY FROM PEOPLE WHO ARE DYING
3 BECAUSE THEY CAN'T EAT AND ARE LIVING ON THE STREETS. YOU
4 PERSUADE THEM THAT THE PRIMARY PROBLEM IS THE PRISONS. COME
5 BACK WITH THAT MONEY, THEN SURE.

6 **MR. MITCHELL:** EASIER SAID.

7 **JUDGE KARLTON:** EXACTLY.

8 **MR. MITCHELL:** IN CLOSING, THE POTENTIAL ADVERSE
9 CONSEQUENCES OF THE PRISONER RELEASE ORDERS, THE PROPOSED
10 PRISONER RELEASE ORDERS WILL HAVE SUCH ADVERSE IMPACTS ON
11 PUBLIC SAFETY THAT THE COURT SHOULD EITHER DENY THEIR REQUEST
12 FOR A PRISONER RELEASE ORDER OUTRIGHT OR FASHION A MORE
13 NARROWLY TAILORED, LESS INTRUSIVE REMEDY.

14 **JUDGE KARLTON:** I WANT TO ASK YOU A QUESTION. I SORT
15 OF WANTED TO ASK EVERYBODY. UNFORTUNATELY, YOU TURN OUT TO BE
16 THE VICTIM.

17 CAN THE CONGRESS CREATE A STATUTE WHICH SAYS THERE IS
18 A CONSTITUTIONAL VIOLATION AND YOU CAN'T SOLVE IT?

19 **JUDGE REINHARDT:** I CAN GIVE YOU A COUPLE OF
20 EXAMPLES.

21 **MR. MITCHELL:** THERE'S A CONSTITUTIONAL VIOLATION
22 THAT CAN'T BE SOLVED?

23 **JUDGE KARLTON:** NO. THERE IS A CONSTITUTIONAL
24 VIOLATION, BUT YOU, THE COURTS, ARE PROHIBITED FROM SOLVING IT.

25 **JUDGE REINHARDT:** YOU HAVEN'T READ THE HABEAS

1 STATUTE.

2 **JUDGE KARLTON:** WE ARE NOT TALKING ABOUT 254.

3 DOES THE CONGRESS HAVE THE AUTHORITY TO PREVENT THE
4 COURTS FROM ADDRESSING THE CONSTITUTIONAL VIOLATION?

5 **MR. MITCHELL:** CONSTITUTIONAL RIGHTS, FROM MY
6 UNDERSTANDING OF CONSTITUTIONAL LAW, CAN BE INFRINGED UPON WHEN
7 THERE ARE COMPELLING STATE CIRCUMSTANCES OR CRITERIA OR A
8 RATIONAL BASIS FOR SUCH.

9 AND TO A CERTAIN -- I THINK TO A CERTAIN EXTENT, YES,
10 THERE CAN BE VIOLATIONS OF CONSTITUTIONAL RIGHTS THAT CANNOT BE
11 REMEDIED IN A PARTICULAR PERIOD OF TIME.

12 **JUDGE KARLTON:** THAT -- USING YOUR EXAMPLE OF
13 REMEDIES, THAT DOESN'T SAY THERE CAN'T BE A REMEDY DEFINES THE
14 CONSTITUTIONAL RIGHT IN THAT FASHION.

15 HERE, THE QUESTION -- APPARENTLY, AT LEAST NOBODY HAS
16 SUGGESTED OTHERWISE. THE CONSTITUTION REQUIRES THAT IF THE
17 STATE IMPRISONS SOMEBODY, IT PROVIDE A MINIMUM OF
18 CONSTITUTIONALLY ADEQUATE MEDICAL CARE. SO THAT'S A
19 CONSTITUTIONAL RIGHT THAT EXISTS.

20 NOW, THE QUESTION IS, CAN THE CONGRESS -- DOES THE
21 CONGRESS HAVE THE POWER TO PREVENT A CO-EQUAL BRANCH OF
22 GOVERNMENT WHICH HAS THE OBLIGATION TO PROTECT CONSTITUTIONAL
23 RIGHTS FROM DOING SO, JUST SAYING YOU CAN'T ADDRESS THAT
24 PROBLEM?

25 **MR. MITCHELL:** I DON'T KNOW THE ANSWER TO THAT

1 QUESTION.

2 JUDGE KARLTON: THAT MAKES TWO OF US.

3 JUDGE REINHARDT: I DO.

4 JUDGE KARLTON: YOU ONLY THINK YOU DO BECAUSE YOU ARE
5 SMARTER THAN I AM.

6 MR. MITCHELL: THANK YOU.

7 CLOSING ARGUMENT

8 MS. BARLOW: GOOD AFTERNOON, YOUR HONORS. KIMBERLY
9 HALL BARLOW FOR THE LAW ENFORCEMENT INTERVENORS.

10 FIRST, I WANT TO THANK THE COURT FOR ALLOWING US TO
11 PARTICIPATE. AND I KNOW THE COURT HASN'T ALWAYS APPRECIATED MY
12 APPROACH TO THIS CASE AND I CERTAINLY INTENDED NO DISRESPECT TO
13 THE COURT.

14 I RECOGNIZE THE AWESOME RESPONSIBILITY THAT YOU HAVE
15 HERE AND WE WANTED TO PARTICIPATE BECAUSE IT IS SUCH AN AWESOME
16 RESPONSIBILITY. AND, FRANKLY, IT'S ONE THAT MY CLIENTS SHARE
17 WITH YOU.

18 I DON'T WANT TO MAKE LIGHT OF THIS, BUT THE REALITY
19 IS THIS IS A ZERO SUM GAME. YOU HAVE A FIXED NUMBER OF PEOPLE
20 THAT ARE COMMITTING CLAIMS IN THIS STATE. WE DON'T KNOW WHY.
21 WE SPEND A LOT OF TIME TALKING ABOUT WHY THAT IS, BUT THAT'S
22 THE REALITY.

23 THE ONLY QUESTION IS: WHERE DO WE PUT THEM? DO WE
24 KEEP THEM IN PRISONS WHERE THEY GET MAYBE NOT THE LEVEL OF CARE
25 THAT WE WOULD LIKE TO THEM TO GET, OR DO WE LET THEM OUT AND

1 ALLOW THEM TO CONTINUE VICTIMIZING PEOPLE AT A HIGHER RATE,
2 GREATER RATE IN A FASTER WAY?

3 **JUDGE REINHARDT:** IT'S SLIGHTLY DIFFERENT. THE
4 QUESTION IS NOT DO THEY RECEIVE THE LEVEL OF CARE WE WANT THEM
5 TO GET. THE QUESTION IS, IF THEY ARE UNABLE TO PROVIDE THE
6 CONSTITUTIONALLY REQUIRED CARE, WHAT DO YOU DO?

7 **MS. BARLOW:** WELL, WITH RESPECT, YOUR HONOR, I THINK
8 THE EVIDENCE DEMONSTRATED THAT THEY CAN DO THAT --

9 **JUDGE REINHARDT:** THAT'S A DIFFERENT QUESTION. YOU
10 WERE TALKING ABOUT A -- IF YOU WANT TO SHIFT TO THE QUESTION OF
11 IS THERE REALLY A CONSTITUTIONALLY ADEQUATE CARE, THAT'S A
12 DIFFERENT QUESTION.

13 **MS. BARLOW:** WELL, I'M NOT DISPUTING. THE COURT HAS
14 MADE THOSE FINDINGS AND I RECOGNIZE THE COURT'S RULINGS THAT
15 THAT IS NOT REALLY FOR DISPUTE HERE.

16 THE QUESTION IS, WHAT THE CAUSE OF THAT IS, WHAT THE
17 ALTERNATIVES TO A RELEASE ORDER ARE AND, INDEED, WHAT IS A
18 PRISONER RELEASE ORDER THAT THIS COURT HAS THE POWER TO ISSUE.

19 MY CLIENTS, THE LAW ENFORCEMENT REPRESENTATIVES AND
20 OFFICIALS FROM UP AND DOWN THE STATE, FROM LARGE COMMUNITIES,
21 SMALL COMMUNITIES, FROM LOS ANGELES COUNTY, AVENAL COUNTY, THE
22 BIGGEST CONTRIBUTOR AND SMALLER CONTRIBUTOR, THE PROBATION
23 CHIEFS, THEY CAME TO TALK TO YOU.

24 THEY WANTED TO PARTICIPATE IN THIS CASE. THEY CAME
25 TO TALK TO YOU TRUTHFULLY AND EARNESTLY ABOUT THEIR FEARS.

1 NOW, PLAINTIFFS SAY THOSE FEARS ARE EXAGGERATED.

2 AND I KNOW WE'VE TALKED ABOUT THE DIFFERENCE BETWEEN
3 INCREASING AND ACCELERATING CRIME, BUT IT'S VERY IMPORTANT THAT
4 THE COURT RECOGNIZE DR. AUSTIN'S TESTIMONY WAS THERE WILL BE AN
5 INCREASE. HE DEEMS IT STATISTICALLY INSIGNIFICANT.

6 BUT YOU ARE NOT STATISTICIANS AND THE PEOPLE THAT ARE
7 GOING TO BE VICTIMS OF THOSE ADDITIONAL CRIMES ARE NOT
8 STATISTICIANS. AND ALL THEY KNOW IS THEY HAVE BEEN VICTIMIZED.

9 THERE HAS BEEN DISCUSSION ABOUT -- FROM THE LAWYERS
10 AND JUDGES BOTH THAT HAVE BEEN VICTIMIZED BY CRIMES IN THEIR
11 LIVES. SO HAVE I.

12 I WANT YOU TO CONSIDER FOR A MOMENT THE EXPERIENCE OF
13 BEING A VICTIM AND HOW IT FELT TO YOU AND WHETHER IT WOULD HAVE
14 MATTERED TO YOU THAT THAT PERSON SHOULD HAVE BEEN IN PRISON
15 WHEN THE CRIME AGAINST YOU WAS COMMITTED.

16 WE TALKED ABOUT THE NUMBER OF ARRESTS VERSUS THE
17 NUMBER OF CRIMES VERSUS THE NUMBER OF PRISONERS. I HAVE BEEN A
18 VICTIM OF 14 CRIMES, SIX OF THEM SERIOUS VIOLENT CRIMES. OKAY?
19 ONE ARREST.

20 NOW, I'M PROBABLY UNUSUAL, EXCEPT ACCORDING TO
21 DR. AUSTIN, DR. AUSTIN SAYS, KIND OF BLIGHTY I THOUGHT, THE
22 PEOPLE IN THIS COURTROOM ARE A LOT LESS LIKELY TO BE VICTIMIZED
23 BY THESE PEOPLE COMING OUT. AND HE IS NOT PERSONALLY CONCERNED
24 FOR HIMSELF IF YOU ISSUE A PRISONER RELEASE ORDER.

25 **JUDGE HENDERSON:** THE PERSONS IN THIS COURT ARE NOT

1 LIKELY, IS THAT WHAT YOU SAID?

2 **MS. BARLOW:** HE SAID THAT WE WERE LESS LIKELY BECAUSE
3 WE LIVE IN MORE AFFLUENT AREAS. WE'RE MORE EDUCATED. AND YOU
4 KNOW WHAT? THAT MIGHT BE TRUE. BUT MY CLIENTS DON'T WORK IN
5 AFFLUENT AREAS. THEY WORK IN THE AREAS WHERE CRIME IS HIGH,
6 WHERE GANGS ARE A PROBLEM, WHERE DRUGS ARE A PROBLEM.

7 WE HAD TESTIMONY FROM THE HIGHEST-- FROM THE AUTO
8 THEFT CAPITOL OF THE WORLD, THE METH CAPITAL OF THE WORLD.
9 THEY ARE DEALING WITH THE PEOPLE WHO WILL BE VICTIMS AND THEY
10 ARE THE ONES WHO HAVE TO STAND THERE AND FACE THESE VICTIMS AND
11 TELL THEM THEY DON'T HAVE ENOUGH RESOURCES, AND TELL THEM,
12 YEAH, THIS GUY GOT OUT OF PRISON EARLY BECAUSE THERE IS NO ROOM
13 AT THE INN. AND I CAN'T EVEN KEEP HIM LOCKED IN THE COUNTY
14 JAIL BECAUSE THERE IS NO ROOM THERE EITHER.

15 THE PEOPLE THAT ARE GOING TO BE VICTIMS ARE SPOUSES
16 AND CHILDREN AND NEIGHBORS OF THESE FOLKS, BURGLARS, CHILD
17 ABUSERS, SPOUSAL ABUSERS, DRUNK DRIVERS. THERE WAS EVIDENCE
18 BEFORE YOU THAT ONE OF THE PEOPLE RELEASED EARLY FROM
19 LOS ANGELES COUNTY WAS A DRUNK DRIVER WHO KILLED SOMEBODY.

20 NOW, MAYBE ANOTHER TIME, FOUR MONTHS LATER, HE IS
21 DRIVING DRUNK AND NOBODY IS THERE WHEN HE DRIVES THROUGH THE
22 INTERSECTION. YOU CAN'T SAY. YOU JUST CAN'T SAY THAT THERE IS
23 NO IMPACT. THERE IS AN IMPACT.

24 **JUDGE HENDERSON:** BUT ISN'T THAT THE NATURE OF THIS
25 PROBLEM? I WAS THINKING THAT WHEN MISS TILLMAN WAS ARGUING

1 THAT SINCE 1994, 2009 WE HAVE MADE PROGRESS. AND JUDGE KARLTON
2 SAID, YES, BUT WE STILL ARE A THOUSAND BEDS SHORT, WHATEVER IT
3 WAS. I TEND TO PERSONALIZE. THERE ARE A THOUSAND PEOPLE WHO
4 DON'T HAVE IT, WHO ARE VICTIMS. AND THAT'S THE NATURE OF THIS.

5 **MS. BARLOW:** BUT MY POINT IS THE IMPACT -- FIRST OF
6 ALL, THERE ARE IMPACTS TO THE PRISONERS, TOO, IF YOU ORDER
7 EARLY RELEASE, ESPECIALLY THE MENTALLY ILL THAT I WILL TALK
8 ABOUT.

9 BUT, FIRST OF ALL, YOU HEARD EVIDENCE THAT NOT ONLY
10 ARE YOU GOING TO HAVE AN ACCELERATED CRIME AND AN INCREASE IN
11 CRIME, WHAT YOU ARE ALSO GOING TO HAVE IS THE CUMULATIVE IMPACT
12 OF THESE PEOPLE GETTING OUT EARLY OVER AND OVER AGAIN.

13 THE TOTAL AMOUNT OF TIME THAT THEY HAVE TO COMMIT
14 CRIMES IN THEIR LIFETIME IS GOING TO BE MUCH GREATER THAN IF
15 YOU ORDERED A CAP.

16 **JUDGE REINHARDT:** IT SOUNDS VERY DRAMATIC, BUT THE
17 PROBLEM IS, YOU KNOW, IF YOU WEREN'T TALKING ABOUT GETTING OUT
18 A FEW MONTHS EARLIER, YOU HAVE THE SAME ARGUMENTS WITH
19 PAROLEES.

20 I REMEMBER A MAN WHO GOT ELECTED PRESIDENT BY TALKING
21 ABOUT A PAROLEE WHO WAS LET OUT ON A WEEKEND PASS. THE PRISON
22 SYSTEM IS THE CRIMINAL SYSTEM.

23 WE DON'T KNOW THAT A TWO-MONTH SENTENCE OR A
24 FOUR-MONTH SENTENCE IS THE IDEAL SENTENCE. SO SOMEBODY WHO
25 GETS A TWO-YEAR SENTENCE INSTEAD GETS AN 18-MONTH SENTENCE, YOU

1 KNOW, IF OUR LAWS WERE A LITTLE LESS HARSH, THEY WOULD HAVE
2 GOTTEN OUT SIX MONTHS EARLIER ANYWAY.

3 SOME OF THEM PROBABLY SHOULD BE IN JAIL FOR LIFE EVEN
4 THOUGH THEY DIDN'T COMMIT THAT TYPE OF CRIME. SOME OF THEM
5 PROBABLY SHOULD BE IN PRISON FOR A TENTH OF THE TIME THAT THEY
6 ARE THERE.

7 HOW DO YOU CONTROL THAT AND WHY IS IT THAT IT'S MAGIC
8 THAT WE'VE GONE TO A PARTICULAR TYPE OF SENTENCING SYSTEM OR
9 PAROLE SYSTEM? YOU CHANGE THE PAROLE SYSTEM EITHER BY AN
10 INITIATIVE OR BY A LAW AND IT LET'S PEOPLE OUT EARLY OR LONGER.

11 YOU KNOW, IT'S NOT ONLY THE PAROLE SYSTEM THAT WE
12 HAPPEN TO HAVE AT THE MOMENT THAT SOMEBODY SAYS -- OR SOMEONE
13 ELSE SAYS IT SHOULD BE DIFFERENT, OR YOU MODIFY IT BECAUSE THE
14 PRISONS CAN'T HOLD THEM.

15 AND IT'S UNFORTUNATE THAT ANYBODY IS A VICTIM, BUT
16 YOU CAN'T PREVENT CRIME BY SAYING, WELL, LET'S SENTENCE THEM TO
17 TWO YEARS AND IF HE GETS OUT IN 18 MONTHS, WELL, THAT'S A
18 TERRIBLE THING. IT'S A VERY HARD THING TO FIX.

19 **MS. BARLOW:** WELL, WITH RESPECT, YOUR HONOR, I THINK
20 THERE WAS TESTIMONY IN THIS CASE THAT THE INCAPACITATION EFFECT
21 OF IMPRISONMENT DOES HAVE A CRIME REDUCING IMPACT.

22 THERE WAS ALSO TESTIMONY THAT AS THEY GET OLDER, THEY
23 START TO SLOW DOWN, RIGHT? SO YOU KEEP LETTING THEM OUT WHEN
24 THEY ARE YOUNG, WELL, THEY ARE GOING TO KEEP ON COMMITTING A
25 LOT OF CRIMES.

1 YOU KEEP THEM IN A LITTLE LONGER, MAYBE THEY DEVELOP
2 SOME MATURITY. MAYBE THEY HAVE AN OPPORTUNITY TO GET SOME
3 PROGRAMMING. IS THERE ENOUGH? ABSOLUTELY NOT.

4 **JUDGE KARLTON:** FROM THIS PARTICULAR SYSTEM, IT IS
5 UNDISPUTED, BOTH THE PLAINTIFFS AND DEFENDANTS AND YOUR CLIENTS
6 EVEN SAID PRISONS ARE CRIMINOGENIC. THEY TAKE PEOPLE WHO ARE
7 NOT VIOLENT CRIMINALS. BY THE TIME THEY LEAVE PRISON THEY ARE
8 VIOLENT CRIMINALS.

9 NOW, SOMEHOW OR OTHER WHEN WE TALK ABOUT PUBLIC
10 SAFETY, AND IT'S A HORRIFICALLY COMPLEX PROBLEM. I DON'T MEAN
11 TO SUGGEST OTHERWISE. IT'S IMPORTANT TO UNDERSTAND WHAT WE ARE
12 DOING NOW IS ANOTHER DISASTER. NOT JUST IN TERMS OF FAILURE TO
13 PROVIDE ADEQUATE, CONSTITUTIONALLY ADEQUATE PHYSICAL AND MENTAL
14 HEALTH, BUT WE ARE, IN FACT, CREATING CRIME.

15 AND AT LEAST, ARGUABLY, IF WE HAD FEWER PEOPLE IN
16 PRISON SO THAT WE COULD PROVIDE PROGRAMMING, AT LEAST IN
17 THEORY, SOME OF THOSE FOLKS MIGHT STRAIGHTEN OUT OR FIND THAT
18 THERE IS A BETTER WAY TO DO THINGS OR WHATEVER.

19 GOD KNOWS WHY PEOPLE CREATE CRIMES, PERFORM CRIMES
20 ANYHOW. BUT, I MEAN, IT ISN'T AS IF WE'VE GOT SOME GOOD SYSTEM
21 NOW THAT WILL PREVENT CRIME AND THAT A COURT ORDER WOULD
22 SOMEHOW OR OTHER DISRUPT THAT SYSTEM. WE HAVE A SYSTEM THAT'S
23 FAILED.

24 **MS. BARLOW:** I CAN'T DISAGREE WITH THAT, YOUR HONOR,
25 AND I THINK THAT WE DO HAVE METHODS THAT WE CAN USE. AND MY

1 CLIENTS, YES, THEY -- I WOULD BE WRONG IF I STOOD UP HERE AND
2 TOLD YOU THAT THEY DIDN'T SAY PRISON IS CRIMINOGENIC. IT IS.
3 THE PROBLEM IS THAT BEFORE WE SEND PEOPLE TO PRISON,
4 THEY'VE ALREADY COMMITTED SO MANY CRIMES AND FAILED SO MANY
5 TIMES THAT -- YOU KNOW, I'M NOT SUGGESTING WE THROW AWAY THE
6 KEY.

7 WHAT I AM SUGGESTING IS THAT THERE ARE WAYS WE CAN
8 REDUCE THE PEOPLE GOING TO PRISON AND WE CAN REDUCE THE AMOUNT
9 OF CRIME, BUT WE HAVE TO DO IT AT THE FRONT END.

10 **JUDGE KARLTON:** LET'S TALK ABOUT THAT. BECAUSE I
11 THINK AN AWFUL LOT OF WHAT YOU WANT TO SAY IS NOT HELPFUL, BUT
12 THIS IS POTENTIALLY VERY HELPFUL.

13 AT LEAST SOME OF YOUR CLIENTS SUGGESTED THAT IF WE
14 JUST GAVE THEM ENOUGH MONEY, THEY COULD DIVERT SOME PERCENTAGE
15 OF PEOPLE FROM PRISON. AND I'M SORRY, I DON'T HAVE THOSE
16 FIGURES IN FRONT OF ME. I DON'T KNOW WHAT THEY SAID. BUT, YOU
17 KNOW, WE CAN FIND IT IN THE RECORD.

18 BUT TO DO THAT, SOMEBODY HAS GOT TO PAY FOR IT. I
19 MEAN, ONE OF THE THINGS THAT GOES ON IS WE KEEP INCREASING
20 PRISON SENTENCES AND ALL THE REST BY INITIATIVE AND NOBODY ASKS
21 CAN WE PAY FOR IT.

22 AND THE ANSWER IS IF, GOD FORBID, YOU EVER TOLD
23 PEOPLE, YOU KNOW, IT COST 10,000 OR WHATEVER IT IS PER
24 PRISONER, THEY WOULD SAY, LET THEM ALL OUT. ANYWAY --

25 **JUDGE REINHARDT:** NO. YOU TELL THEM THEY WERE GOING

1 TO HAVE TO PAY FOR THE PRISONER, THEY WOULDN'T VOTE FOR IT.

2 **JUDGE KARLTON:** MY QUESTION TO YOU IS -- YOUR CLIENTS
3 HAVE SUGGESTED THESE DIVERSIONS, AND I GOT VERY EXCITED AT ONE
4 POINT THEN REALIZED IT'S PROBABLY NOT WITHIN OUR POWER.

5 CAN WE, IN YOUR VIEW, MAINTAIN THE SYSTEM THAT WE
6 HAVE NOW? DO ESSENTIALLY WHAT ONE OF YOUR CLIENTS SUGGESTED,
7 MAINTAIN THE SYSTEM THAT WE HAVE NOW, EXCEPT THAT SOME
8 PERCENTAGE OF PEOPLE WOULD BE DIVERTED BY THESE OTHER PROGRAMS
9 AND ORDER THE STATE TO PAY FOR IT? CAN WE DO THAT?

10 **MS. BARLOW:** I BELIEVE YOU CAN, YOUR HONOR. A
11 PRISONER RELEASE ORDER UNDER THE PLRA IS ANY ORDER THAT HAS THE
12 PURPOSE OR EFFECT OF REDUCING THE PRISON POPULATION.

13 **JUDGE KARLTON:** THAT'S CERTAINLY A PRISONER RELEASE
14 ORDER. THE QUESTION IS WHETHER THE FEDERAL COURTS HAVE THE
15 POWER TO ORDER THE STATE TO PAY FOR A PROGRAM WHICH DOESN'T
16 EXIST AT THE MOMENT; TO SAY, PAY FOR THAT.

17 **MS. BARLOW:** ACTUALLY, THESE PROGRAMS DO EXIST, YOUR
18 HONOR.

19 **JUDGE KARLTON:** SOME OF THEM DO, SOME OF THEM --

20 **MS. BARLOW:** THE COMMUNITY CORRECTIONS ACT IS ALREADY
21 IN EXISTENCE, SB-618, THE MENTAL HEALTH SERVICES ACT.

22 **JUDGE KARLTON:** THAT'S A GOOD POINT. THERE IS A
23 STATE PROGRAM THAT THE STATE HAS ELECTED NOT TO FUND. CAN WE
24 ORDER THE STATE -- IS IT YOUR VIEW THAT WE HAVE THE POWER TO
25 ORDER THE STATE TO FUND THE PROGRAM?

1 **MS. BARLOW:** THAT WOULD BE A PRISONER RELEASE ORDER
2 AND I BELIEVE THE COURT WOULD HAVE THE POWER TO DO THAT.

3 IF THE COURT DOESN'T HAVE THE POWER TO DO THAT, IF
4 THAT'S WHAT YOU CONCLUDE --

5 **JUDGE KARLTON:** I DON'T KNOW.

6 **MS. BARLOW:** -- THEN THE PLRA ONLY GIVES YOU THE
7 POWER TO ISSUE, QUOTE, A REAL RELEASE AND/OR A CAP. AND ALL
8 THESE OTHER PROGRAMS THAT WERE OFFERED TO YOU IN TESTIMONY ARE,
9 IN FACT, VIABLE ALTERNATIVES.

10 **JUDGE REINHARDT:** NOT VIABLE ALTERNATIVES FOR US TO
11 ORDER.

12 **MS. BARLOW:** NO, BUT THEY ARE AVAILABLE ALTERNATIVES,
13 YOUR HONOR. IF YOU CAN'T ORDER THEM --

14 **JUDGE REINHARDT:** YOU KNOW, THE ACT SAYS WE CAN'T
15 ORDER TAX INCREASES.

16 **MS. BARLOW:** NO.

17 **JUDGE REINHARDT:** BUT THAT DOESN'T MEAN WE CAN'T
18 ORDER THE EXPENDITURE OF FUNDS.

19 **MS. BARLOW:** IN FACT, BOTH OF THESE COURTS HAVE
20 ORDERED MANY EXPENDITURES OF FUNDS IN CONNECTION WITH THESE
21 CASES.

22 **JUDGE KARLTON:** IN A VERY DIFFERENT CONTEXT.

23 MR. MELLO, I'M SORRY, IT'S NOT FAIR TO YOU, BUT I'M
24 COMING BACK. I THINK YOU SAID -- NO, I DON'T WANT TO TELL YOU
25 WHAT YOU SAID.

1 TAKING THE PARTICULAR PROGRAM THAT IS BEING REFERRED
2 TO NOW, THE COMMUNITY WHAT? WHAT IS IT CALLED?

3 **MS. BARLOW:** IT'S THE COMMUNITY CORRECTIONS ACT, YOUR
4 HONOR.

5 **JUDGE KARLTON:** CAN WE ORDER THE STATE TO FUND THOSE
6 PROGRAMS? DO WE HAVE THE POWER? PLEASE.

7 **MR. MELLO:** FIRST OF ALL, I BELIEVE THAT WE DID PUT
8 STATEMENTS REGARDING THIS VERY LEGAL ISSUE IN OUR PROPOSED
9 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

10 I BELIEVE WE CITED TO THE RHEM CASE, WHICH IS IN OUR
11 PAPERS, WHICH SAID THAT THIS COURT CANNOT ORDER THE
12 APPROPRIATION OF FUNDS.

13 **JUDGE KARLTON:** THANK YOU.

14 **MR. MELLO:** HOWEVER, I MEAN, IF THE COURT WOULD LIKE
15 MORE BRIEFING ON THE ISSUE AT SOME POINT, BUT I WOULD BE GLAD
16 TO SIT BACK DOWN.

17 **JUDGE REINHARDT:** WHEN YOU SAY APPROPRIATION OF
18 FUNDS, APPROPRIATION --

19 **MR. MELLO:** FRANKLY, I BELIEVE THE CASE WE CITED SAID
20 AND THE ALLOCATION OF FUNDS. I BELIEVE. AND IT IS IN OUR
21 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW. IT'S ON PAGE
22 51 OF OUR PROPOSALS.

23 **JUDGE REINHARDT:** WHAT'S THE CITATION?

24 **MR. MELLO:** 507 F.2D 333 PINPOINT 341, IT'S A SECOND
25 CIRCUIT CASE. AND IT'S PRE-PLRA, JUST SO YOU KNOW, SO IT

1 COMPLICATES IT A LITTLE BIT. BUT I BELIEVE THAT IT DOES SPEAK
2 TO THIS ISSUE.

3 **JUDGE KARLTON:** THANK YOU VERY MUCH.

4 **MS. BARLOW:** IN ANY EVENT, YOUR HONOR, I THINK THE
5 POINT THAT WE WERE TRYING TO MAKE WAS THAT THE STATUTE SAYS
6 THAT YOU HAVE THE RIGHT TO ISSUE AN ORDER, ANY ORDER THAT HAS
7 THE PURPOSE OR EFFECT OF REDUCING THE PRISON POPULATION.

8 ALL OF THESE ALTERNATIVES THAT WERE TESTIFIED ABOUT,
9 SB-618, SB-718, THE COMMUNITY CORRECTIONS ACT, THE MENTAL
10 HEALTH SERVICES ACT, THESE WERE ALL AVAILABLE AND VIABLE
11 ALTERNATIVES TO ACTUALLY ORDERING RELEASE OF PRISONERS.

12 **JUDGE REINHARDT:** THEY ARE NOT VIABLE UNLESS SOMEBODY
13 CAN FUND THEM.

14 **MS. BARLOW:** WITH RESPECT, YOUR HONOR, THEY ARE
15 EITHER GOING TO PAY FOR IT AT THE FRONT END OR THEY'RE GOING TO
16 PAY FOR IT WHEN THEY GET REARRESTED.

17 **JUDGE KARLTON:** EVERYBODY AGREES WITH THAT, BUT THE
18 STATE TAKES THE VIEW WE ARE GOING TO DO IT AT THE END.

19 **JUDGE REINHARDT:** AS I SAID EARLIER, WE MIGHT WANT
20 FURTHER BRIEFING ON THIS. WHEN THE STATUTE SAYS YOU CAN'T
21 ORDER TAXES, IT COULD HAVE SAID YOU CAN'T ORDER THE EXPENDITURE
22 OF FUNDS. IT DIDN'T SAY THAT. IT SAID YOU CAN'T ORDER TAXES.

23 **MS. BARLOW:** RIGHT.

24 **JUDGE REINHARDT:** SO I THINK THAT THIS IS A LEGAL
25 ISSUE.

1 **JUDGE KARLTON:** I THINK THERE IS A FEDERALISM PROBLEM
2 OVER AND ABOVE WHAT THE STATUTE SAYS. THE STATUTE IS WRITTEN
3 AGAINST THE BACKGROUND AND POWER OF THE COURT.

4 **JUDGE REINHARDT:** I BELIEVE THE FEDERAL COURT ORDERED
5 IT DURING THE SCHOOL INTEGRATION PERIOD. ALL I'M SAYING IS THE
6 ISSUE MAY BE WE WILL ONCE AGAIN BE DEFEATED BY CRIMINALISTS,
7 BUT I'M NOT SO SURE OF THAT IN THESE EVENTS. WE MAY WANT TO
8 HEAR FROM ALL OF YOU ON THAT.

9 IF YOU ALL SAY WE CAN'T ORDER THE STATE TO SPEND ANY
10 MONEY, THEN THAT LIMITS OUR ABILITY TO GIVE THAT KIND OF RELIEF
11 YOU WOULD LIKE AND THE COUNTIES WOULD LIKE AND LAW ENFORCEMENT
12 PEOPLE, THE DISTRICT ATTORNEYS.

13 **JUDGE KARLTON:** ALTHOUGH, AGAIN, IT IS POSSIBLE FOR
14 US TO SAY, STATE, THIS IS AS MANY PEOPLE AS YOU CAN PUT IN
15 PRISON. YOU FIGURE IT OUT AND YOU CAN SPEND THE MONEY IF YOU
16 CHOOSE.

17 IN OTHER WORDS, GIVING THE STATE THE OPPORTUNITY, NOT
18 ORDERING THEM TO DO ANYTHING OTHER THAN TO RELEASE PRISONERS
19 BECAUSE MAYBE THAT'S ALL WE CAN DO. I DON'T KNOW. I REALLY
20 DON'T KNOW.

21 BUT SAYING TO THE STATE, THAT PROBABLY IS NOT THE
22 BEST WAY OF DOING THINGS. AND IT'S UP TO YOU NOW TO PROPOSE A
23 PLAN, MAYBE FUNDING ALL OF THE PROGRAMS THAT YOU ARE TALKING
24 ABOUT OR RELEASING SOME PORTION OF PEOPLE OFF OF PAROLE OR
25 WHATEVER. BUT THAT MAY BE A WAY OF AVOIDING THIS PROBLEM IF IT

1 IS, INDEED, THE PROBLEM THAT MR. MELLO SUGGESTED, WHICH YOU MAY
2 BE RIGHT. I WOULD NOT BE SURPRISED IF HE IS RIGHT.

3 **MS. BARLOW:** WELL, AND, AGAIN, YOUR HONOR, WE DIDN'T
4 BRIEF THAT ISSUE SPECIFICALLY, BUT I THINK THE STATUTE SAYS
5 WHAT IT MEANT.

6 IF THE ONLY POWER THIS COURT HAD WAS TO ORDER A CAP
7 OR A RELEASE, I THINK THE STATUTE WOULD HAVE SAID THAT. THE
8 DEFINITION OF A PRISONER RELEASE ORDER WOULD BE DIFFERENT.

9 **JUDGE KARLTON:** MAYBE IT WILL BE THAT CONGRESS JUST
10 DIDN'T THINK ABOUT THE FACT THAT, YOU KNOW, IT'S LIKE THE
11 VIOLENCE AGAINST WOMEN ACT, THEY DIDN'T NOTICE THAT. THEY
12 DIDN'T HAVE THE POWER TO PASS THE STATUTE.

13 **MS. BARLOW:** THAT DOES HAPPEN, YOUR HONOR. I'M AWARE
14 OF THAT.

15 **JUDGE KARLTON:** EVERY ONCE IN A WHILE IT HAPPENS.

16 **JUDGE REINHARDT:** MORE AND MORE THESE DAYS.

17 **MS. BARLOW:** YES.

18 THE CUMULATIVE IMPACT IS WHAT I WAS TALKING ABOUT,
19 AND I WANT TO MAKE SURE THAT WE DON'T FORGET THAT THERE WAS
20 TESTIMONY HERE THAT AT A TIME WHEN WE ARE REDUCING THE NUMBER
21 OF POLICE OFFICERS ALL OVER THE STATE, THAT WHEN YOU ISSUE A
22 RELEASE ORDER -- FIRST OF ALL, THEY ARE ONLY LIKELY TO GET
23 CAUGHT ONE OUT OF TEN TIMES ALREADY, TO START WITH, AT STATUS
24 QUO.

25 BUT AS OUR NUMBER OF POLICE OFFICERS GO DOWN AND THE

1 NUMBER OF PAROLEES AND PEOPLE WHO OUGHT TO BE IN PRISON AREN'T
2 IN PRISON, ARE STILL IN THE COMMUNITIES, THE LIKELIHOOD OF THEM
3 GETTING CAUGHT IS GOING TO GO DOWN AS WELL FROM WHAT IT IS NOW.
4 SO WE ARE GOING TO HAVE MORE CRIME. THERE ARE GOING TO BE MORE
5 VICTIMS.

6 MY PROBATION CHIEFS I THINK SPOKE VERY COMPELLINGLY
7 ABOUT THE EFFORTS THEY MAKE TO TRY AND STEER THESE PEOPLE INTO
8 BETTER LIVES AND GIVE THEM OPPORTUNITIES TO CHANGE THEIR LIVES
9 AND NOT GO TO PRISON.

10 **JUDGE REINHARDT:** YOU KNOW, AM I WRONG WHEN I KEEP
11 READING THE PAPERS ABOUT ALL THESE POLICE CHIEFS WHO ARE SAYING
12 HOW CRIME RATE IS GOING DOWN THESE DAYS, AND THESE ARE IN
13 PLACES WHERE YOU HAVE CAPS ON THE JAILS? THEY CAN'T KEEP THEM.
14 THEY ARE LETTING THEM GO OUT AND THE CRIME RATE GOES DOWN. IS
15 THAT RIGHT?

16 **MS. BARLOW:** THERE'S NO CORRELATION THERE. THE CRIME
17 RATE IS GOING DOWN, BUT THAT DOESN'T MEAN THAT THE PEOPLE THAT
18 ARE THE MOST LIKELY TO OFFEND, THAT THEIR CRIME RATE IS GOING
19 DOWN. THAT'S NOT HAPPENING.

20 **JUDGE REINHARDT:** THEN IT SHOULD GO UP, IF YOU HAVE
21 MORE AND MORE PEOPLE WHO SHOULD BE IN JAIL OUT ON THE STREETS
22 AND YET THE CRIME RATE IS GOING DOWN.

23 **MS. BARLOW:** MORE PEOPLE AREN'T COMMITTING CRIMES,
24 BUT THE CRIMINALS ARE COMMITTING MORE CRIMES. THAT'S WHY THE
25 CRIME RATE IS GOING DOWN AND YET WE STILL HAVE THESE PEOPLE WHO

1 ARE REOFFENDING OVER AND OVER AND OVER AGAIN.

2 **JUDGE REINHARDT:** THAT'S AN INTERESTING EXPLANATION.

3 **MS. BARLOW:** IN ANY EVENT, AS MY CLIENT TOLD YOU, IT
4 TAKES A LOT OF HARD WORK TO GET INTO PRISON HERE. YOU REALLY
5 HAVE TO TRY HARD. AND INTERESTINGLY ENOUGH, ALTHOUGH PRISON
6 MAY BE CRIMINOGENIC, WE ALSO KNOW THAT THE PEOPLE WHO COMMITTED
7 PERHAPS SOME OF THE MOST VIOLENT CRIMES TO GET INTO PRISON IN
8 THE FIRST PLACE MIGHT BE THE LOWEST RISK TO LET OUT.

9 IT'S A CONUNDRUM AND I'M GLAD I'M NOT SITTING IN THE
10 BLACK ROBE OVER THERE TO TRY TO FIGURE IT OUT.

11 BUT ONE THING WE KNOW FOR SURE, THERE ARE NOT 52,000
12 LOW RISK PRISONERS IN THE STATE OF CALIFORNIA. THERE JUST
13 AREN'T. THERE ARE SECOND STRIKERS AND LIFERS THAT YOU HAVE TO
14 GET TO.

15 SO I UNDERSTAND THE COURT'S POSITION THAT THE NUMBER
16 COULD BE LOWER OR THE TIME COULD BE SPREAD OUT, BUT THE REALITY
17 IS THAT THERE AREN'T THAT MANY LOW RISK PEOPLE IN PRISON.
18 THERE AREN'T 30,000. THERE AREN'T 20,000, BECAUSE THEY HAVE TO
19 WORK SO HARD TO GET THERE IN THE FIRST PLACE.

20 **JUDGE REINHARDT:** DO YOU KNOW UNDER THE GOVERNOR'S
21 PROPOSAL HOW THEY -- TO WHAT EXTENT WOULD IT REDUCE THE PRISON
22 POPULATION?

23 **MS. BARLOW:** ARE YOU SPEAKING, YOUR HONOR --

24 **JUDGE REINHARDT:** PAROLE.

25 **MS. BARLOW:** OF THE PAROLE? WELL, FIRST OF ALL, AS

1 FAR AS THE PAROLE, THE IDEA OF RELEASING PEOPLE WITHOUT PAROLE,
2 AS A PRACTICAL MATTER, WE ARE ALREADY DOING THAT BECAUSE THOSE
3 PEOPLE THAT ARE THE LOWEST RISK ARE THE ONES THAT GO INTO THE
4 BANKS.

5 YOU'RE NOT GOING TO SAVE ANY MONEY. YOU'RE NOT GOING
6 TO SAVE ANYTHING AT ALL BY TAKING THEM OFF PAROLE. YOU'RE ONLY
7 GOING TO DEPRIVE MY CLIENTS OF THE LAW ENFORCEMENT TOOL THAT
8 THEY MAY NEED IF THAT PERSON IS INVOLVED IN A CRIME.

9 BECAUSE THEY ARE NOT GOING TO ACTIVELY SUPERVISED.
10 THEY'RE NOT GETTING ACTIVELY TREATED. WE ARE NOT SPENDING A
11 DIME ON THEM. THEY GET SHOVED INTO A FILE CABINET.

12 THEY ARE ONLY SUPERVISING THAT REALLY HIGH RISK; THE
13 CHILD MOLESTERS, THE VIOLENT CRIMINAL, THE MULTIPLE, MULTIPLE
14 OFFENDERS. THEY ARE NOT SUPERVISING THE -- YOU LET THEM OUT,
15 THERE IS NO SAVINGS THERE.

16 **JUDGE REINHARDT:** YOU ARE SAYING THAT PART OF THE
17 PROPOSAL WILL HAVE NO EFFECT AT ALL.

18 **MS. BARLOW:** I DON'T BELIEVE IT HAS AN EFFECT EXCEPT
19 THAT IT WILL REMOVE A TOOL FROM LAW ENFORCEMENT. IT'S NOT
20 GOING TO HAVE A FINANCIAL BENEFIT TO THE STATE. IT'S ONLY
21 GOING TO HAVE A DETRIMENT TO LAW ENFORCEMENT BECAUSE YOU'RE
22 GOING TO DEPRIVE THEM OF A TOOL.

23 **JUDGE REINHARDT:** WHAT ABOUT THE REST OF THE
24 PROPOSAL?

25 **MS. BARLOW:** WELL, I'M NOT SURE WHICH PART OF THE

1 PROPOSAL...

2 **JUDGE REINHARDT:** WELL, ONE WAY IS TO INCREASE THE
3 AMOUNT FOR THEFT.

4 **MS. BARLOW:** YOUR HONOR, I DON'T THINK MY CLIENTS
5 NECESSARILY HAVE A VIEWPOINT ON THAT. THE FACT OF THE MATTER
6 IS, IF YOU ARE ON PAROLE AND COMMIT ONE OF THOSE CRIMES, IT
7 DOESN'T MATTER WHAT THE STATUTORY AMOUNT IS, IT'S GOING TO BE A
8 FELONY.

9 SO I DON'T KNOW THAT THAT'S GOING TO HAVE A HUGE
10 IMPACT UNLESS YOU DECIDE THAT THERE AREN'T GOING TO BE PAROLEES
11 BEING RETURNED TO PRISON FOR PAROLE VIOLATIONS.

12 **JUDGE HENDERSON:** ANY CRIME COMMITTED ON PAROLE IS A
13 FELONY?

14 **MS. BARLOW:** IF YOU COMMIT A CRIME WHILE YOU ARE ON
15 PAROLE, IT'S A FELONY TO VIOLATE THE TERMS OF YOUR PAROLE.

16 **JUDGE REINHARDT:** ONLY BY CRIMINAL CONDUCT?

17 **MS. BARLOW:** I'M SORRY?

18 **JUDGE REINHARDT:** ONLY BY CRIMINAL CONDUCT? YOU SAID
19 TO VIOLATE THE TERMS OF YOUR PAROLE.

20 **MS. BARLOW:** IF YOU WERE ARRESTED FOR A VIOLATION,
21 IT'S A FELONY ARREST. THEY MAY NEVER CHARGE IT AS A FELONY.
22 THEY MAY NOT VIOLATE THAT PERSON, BUT IT IS A FELONY ARREST.

23 AND I THINK THE EVIDENCE WAS THAT REALLY THE NUMBER
24 OF TECHNICAL VIOLATORS OUT OF THAT 70,000 THAT THEY WERE
25 TALKING ABOUT, IT'S ONLY 14,000 WHICH WERE REALLY TECHNICAL.

1 SO THAT'S NOT A VERY BIG NUMBER.

2 MOST OF THOSE PEOPLE THAT ARE GOING BACK TO PRISON
3 FOR VIOLATIONS OF PAROLE ARE GOING BACK BECAUSE OF THE REAL NEW
4 CRIMES.

5 **JUDGE REINHARDT:** 14,000 IS NOT BAD TO START WITH.

6 **MS. BARLOW:** WELL, OUT OF 70,000, I'M JUST SAYING.

7 **JUDGE REINHARDT:** WELL, IF YOU TAKE 14,000, WE ARE
8 PART OF THE WAY THERE.

9 **JUDGE KARLTON:** AND THAT'S CERTAINLY UP TO THE COURT.
10 BUT THE POINT IS, YOU CAN SPREAD IT OUT, YOU CAN REDUCE THE
11 NUMBER, BUT YOU ARE NEVER GOING TO GET RID OF THE IMPACT.

12 PERHAPS ONE OF THE POINTS THAT I REALLY WANT TO
13 EMPHASIZE HERE IS ABOUT THE MENTALLY ILL. YOU HEARD TESTIMONY
14 FROM ONE WITNESS THAT IF YOU RELEASE MENTALLY ILL PRISONERS AND
15 THEY END UP HOMELESS, THEY ARE GOING TO BE BETTER OFF HOMELESS
16 THAN THEY WOULD BE IN PRISON. AND THAT'S ABSURD. THEY AREN'T
17 GOING TO GET THE TREATMENT THAT THEY NEED.

18 **JUDGE KARLTON:** THERE IS GOOD REASON TO BELIEVE THEY
19 ARE NOT GOING TO GET TREATMENT IN PRISON EITHER.

20 **MS. BARLOW:** THEY'RE AT LEAST GETTING SOME TREATMENT
21 NOW, YOUR HONOR. IT MAY NOT BE AS MUCH AS --

22 **JUDGE KARLTON:** NO, THEY AREN'T. NOT NECESSARILY.
23 THERE ARE PEOPLE -- NEVER MIND. GO AHEAD.

24 **MS. BARLOW:** THE VAST MAJORITY OF THEM ARE GETTING
25 SOME KIND OF TREATMENT. AND ON THE STREET, BASED UPON THEIR

1 KINDS OF PATHOLOGY THAT MR. CONKLIN DESCRIBED, THEY'RE NOT
2 GOING TO VOLUNTARILY GO OUT AND GET THE TREATMENT THAT THEY
3 NEED. THEY ARE NOT GOING TO STAY ON THEIR MEDICATION. THEY'RE
4 GOING TO END UP HOMELESS AND THEY ARE GOING TO BE VICTIMIZED
5 THEMSELF OR THEY'RE GOING TO REVICTIMIZE SOMEONE ELSE AND THEN
6 END UP RIGHT BACK IN PRISON. SO THIS IS NOT A SOLUTION FOR THE
7 MENTALLY ILL.

8 AND IF YOU TARGETED THE NON-MENTALLY ILL IN ORDER TO
9 PROVIDE BETTER SERVICES TO THE MENTALLY ILL, THEN YOU END UP ON
10 THE OTHER SIDE OF THE PROBLEM BECAUSE YOU ARE NOT NARROWLY
11 TARGETING YOUR REMEDY TO THE PEOPLE WHO ARE SUFFERING THE
12 CONSTITUTIONAL DEPRIVATION.

13 IF YOU PUSH PEOPLE OUT OF PRISON AND THEY REOFFEND
14 AND WE PUT THEM IN THE COUNTY JAIL, YOU ARE GOING TO HAVE TO
15 PUSH SOMEBODY OUT OF THESE COUNTY JAILS. AND WE ARE ALREADY --
16 WE'VE ALREADY GONE FROM AN 80 PERCENT FELONY -- OR 80 PERCENT
17 MISDEMEANOR AND 20 PERCENT FELONS IN COUNTY JAILS TO THE FLIP
18 SIDE OF THAT. THERE IS 80 PERCENT FELONS NOW IN OUR COUNTY
19 JAILS AND ONLY 20 PERCENT MISDEMEANOR. AND THOSE ARE SERIOUS
20 MISDEMEANOR. BECAUSE THEY ARE NOT KEEPING THOSE PEOPLE.
21 THEY'RE ALREADY LETTING OUT PEOPLE THAT ARE AT THE VERY LOWEST
22 RISK. THEY ARE CITING AND RELEASING.

23 THEY ARE NOT EVEN KEEP PEOPLE THAT ARE DUI. THEY ARE
24 LETTING PEOPLE OUT BECAUSE THEY DON'T HAVE ENOUGH ROOM. THEY
25 ARE LETTING PEOPLE OUT EARLY FROM SENTENCES. THEY ARE LETTING

1 PEOPLE OUT EARLY ON PRETRIAL.

2 AND IF YOU PUSH PEOPLE DOWN IN THE SYSTEM, WHICH IS
3 WHAT HAPPENS WITH THE PRISONER RELEASE ORDER, WE DON'T HAVE
4 ANYBODY LEFT AT THE COUNTY LEVEL THAT WE CAN CONSIDER LOW RISK
5 TO LET OUT.

6 SOMEBODY -- IF IT'S NOT THE EARLY RELEASE PRISONER,
7 THE PERSON THAT GETS PUSHED OUT OF THE COUNTY FACILITY BECAUSE
8 THERE IS NO ROOM FOR THEM THERE, THOSE PEOPLE ARE GOING TO
9 REOFFEND, TOO.

10 AND WE KNOW THAT THE PROGRAM AT THE COUNTY LEVEL,
11 WE'VE HAD GREAT SUCCESS AND HAD EVIDENCE ABOUT THE SUCCESS IN
12 ORANGE COUNTY AND THE SUCCESS IN L.A. COUNTY FROM PROGRAMMING.
13 WE ALSO KNOW THAT YOU GET VERY BAD RESULTS FROM EARLY RELEASE
14 FROM THOSE FACILITIES.

15 YOU'VE GOT TESTIMONY IN FRONT OF YOU THAT 3240 PEOPLE
16 FROM ORANGE COUNTY WHO WERE EARLY RELEASED IN A THREE-YEAR
17 PERIOD WERE REARRESTED FOR CRIMES COMMITTED DURING THE EARLY
18 RELEASE PERIOD, AND MANY OF THEM WERE VERY SERIOUS CRIMES.

19 TEN PERCENT OF THE EARLY RELEASES FROM LOS ANGELES
20 COUNTY WEREN'T JUST REARRESTED, BUT THEY WERE REARRESTED FOR
21 CRIMES COMMITTED DURING THEIR EARLY RELEASE PERIOD. AND THE
22 MORE YOU RELEASED THEM, THE HIGHER THE RATE WENT.

23 SO SOMEBODY IS GOING TO END UP BACK IN THE COMMUNITY
24 THAT DOESN'T BELONG THERE, WHETHER IT'S THE PERSON THAT COMES
25 FROM THE PRISON OR THE PERSON THAT GETS PUSHED OUT OF THE

1 COUNTY JAIL.

2 AND MY CLIENTS ARE THE ONES GOING TO HAVE TO DEAL
3 WITH THEM. NOT DR. AUSTIN, WHO DOESN'T HAVE TO LIVE WITH THE
4 RESULTS OF WHAT HE RECOMMENDS. THE MEN AND WOMEN WHO HAVE TO
5 CONSOLE THE VICTIMS, PUT THEIR LIVES ON THE LINE, ADVISE PEOPLE
6 WHO AREN'T LISTENING TO THEM, AND STAND BY HELPLESSLY WHILE
7 MORE PEOPLE ARE VICTIMIZED.

8 WE KNOW THESE PEOPLE ARE GETTING MORE HARD CORE AT
9 THE LOCAL LEVEL. WE SEE IT HAPPENING. IT'S ONLY GOING TO GET
10 WORSE.

11 WITH RESPECT TO DR. AUSTIN AND HIS STUDIES, I JUST
12 HAVE A COUPLE POINTS TO MAKE. WE KNOW THAT THE TOTAL ARREST
13 DOESN'T REALLY TELL US VERY MUCH ABOUT THE CRIME THAT'S BEING
14 COMMITTED. SO HIS ANALYSIS OF THE TOTAL PERCENTAGE OF TOTAL
15 ARRESTS REALLY DOESN'T MEAN ANYTHING, BECAUSE HE IS NOT TALKING
16 ABOUT THE CRIMES THAT ARE COMMITTED. HE IS JUST TALKING ABOUT
17 THE ARRESTS THAT ARE MADE.

18 HE'S ALSO IGNORING THE ACTUAL EVIDENCE OF THE
19 SEVERITY AND NUMBER OF CRIMES THAT HAVE BEEN DOCUMENTED OF
20 THOSE THAT ARE LET OUT EARLY, AND HE'S IGNORING THE EVIDENCE
21 THAT A LARGE NUMBER OF ARRESTEES THROUGHOUT THE STATE ARE
22 EARLY.

23 IN FRESNO COUNTY IN 2007, 30 PERCENT OF FELONY
24 ARRESTS WERE OF PAROLEES. NOT LESS THAN 1 PERCENT.

25 **JUDGE REINHARDT:** I DON'T UNDERSTAND. WHAT DOES THAT

1 SHOW? PEOPLE SHOULDN'T BE PUT ON PAROLE OR SHOULD BE KEPT IN
2 JAIL LONGER THAN THE TERMS?

3 **MS. BARLOW:** IT MEANS THOSE PEOPLE ARE MORE
4 DANGEROUS, YOUR HONOR, THAN THE REST OF THE PEOPLE. IF --
5 DR. AUSTIN IS TELLING YOU THAT PAROLEES REPRESENT A VERY SMALL
6 FRACTION OF THE TOTAL NUMBER OF ARRESTS.

7 ALL I CAN TELL YOU IS THE DATA BEFORE YOU, THE ACTUAL
8 EVIDENCE, DOES NOT SUPPORT THAT. THIRTY PERCENT OF FELONY
9 ARRESTS IN FRESNO WERE PAROLEES IN 2007. THAT'S BECAUSE THEY
10 COMMIT CRIMES. THAT'S WHAT THEY DO. THAT'S HOW THEY GOT TO BE
11 PAROLEES IN THE FIRST PLACE.

12 YOU HAVE RECEIVED WRITTEN AND ORAL TESTIMONY FROM 13
13 LAW ENFORCEMENT WITNESSES AND I CAN PUT ON ALL 67 OF THEM IF
14 YOU LET ME BECAUSE THEY ALL WOULD HAVE TOLD YOU THE SAME THING.
15 THEIR COMMUNITIES WILL SUFFER HORRIBLE IMPACTS FROM THE RELEASE
16 ORDER.

17 COULD YOU MAKE IT BETTER WITH FUNDING AND
18 PROGRAMMING? YOU ABSOLUTELY COULD. YOU'RE BEING TOLD YOU
19 CAN'T DO THAT. I BELIEVE THAT YOU CAN BECAUSE THAT WOULD HAVE
20 THE INTENT AND EFFECT OF REDUCING THE PRISON POPULATION.

21 WE COULD USE THE JUVENILE MODEL AS AN ABSOLUTE PROOF
22 THAT YOU CAN REDUCE THE AMOUNT OF PEOPLE IN CUSTODY IF YOU
23 PROGRAM THEM. THEY'VE DONE IT WITH THE JUVENILES. THEY CAN DO
24 WITH THE ADULTS.

25 IF YOU REALLY CAN'T MAKE THAT ORDER, THEN YOU HAVE TO

1 LOOK AT THESE AVAILABLE ALTERNATIVES. MAYBE YOU TELL THE STATE
2 THAT THEY CAN CHOOSE ONE OF THOSE OR ALL OF THOSE. IF YOU
3 DON'T FEEL THAT YOU CAN ORDER IT, WE KNOW THAT THOSE
4 ALTERNATIVES ARE AVAILABLE.

5 YOU GET THEM THEIR SERVICES BEFORE THEY GET RELEASED.
6 YOU PROVIDE MORE PROBATION. YOU PROVIDE MORE PROGRAMMING. YOU
7 IMPLEMENT MENTAL HEALTH COURTS AND DRUG COURTS. THERE ARE
8 VIABLE ALTERNATIVES TO A PRISONER RELEASE ORDER THAT HAVE NOT
9 BEEN EXHAUSTED. THEY ARE BEING BUILT AS WE SPEAK.

10 IN SAN DIEGO COUNTY, IN LOS ANGELES COUNTY, IN
11 AMADOR, IN FRESNO, THEY ARE BEING BUILT AS WE SPEAK. WE SHOULD
12 LET THEM BE BUILT BEFORE WE EVEN THINK ABOUT REDUCING THE
13 PRISON POPULATION BY ONE-THIRD. THE RISK TO THE PUBLIC AND THE
14 PRISONERS THEMSELVES IS TOO GREAT.

15 I KNOW YOU STRUGGLE WITH THIS DIFFICULT QUESTION AND
16 I INVITE YOU AND, IN FACT, I BEG YOU TO KEEP ON STRUGGLING WITH
17 IT. BECAUSE IF YOU MAKE A MISTAKE, MANY PEOPLE WILL GET HURT
18 AND PERHAPS WILL DIE.

19 THE ALTERNATIVES ARE AVAILABLE. THE IMPACTS ARE
20 ENORMOUS. PLEASE DO THE RIGHT THING. THANK YOU.

21 **JUDGE HENDERSON:** THANK YOU, COUNSEL.

22 **CLOSING ARGUMENT**

23 **MS. WOODWARD:** GOOD AFTERNOON, YOUR HONORS. I'M
24 CAROL WOODWARD, COUNTY COUNSEL FOR INTERVENOR SAN MATEO COUNTY,
25 AND I'M SPEAKING ON BEHALF OF THE COUNTY INTERVENORS,

1 SAN MATEO, SANTA CLARA AND SANTA BARBARA COUNTIES.

2 ALSO IN THE COURTROOM IS THERESA FUENTES FROM SANTA
3 CLARA COUNTY, WHO WOULD LIKE TO ADDRESS SOME SPECIFIC THINGS TO
4 SANTA CLARA. AND WE WOULD ASK YOU IF IT PLEASURES THE COURT THAT
5 WE BE ALLOWED TO --

6 **JUDGE REINHARDT:** YOU KNOW, THERE ARE A LOT OF
7 COUNTIES AND THE AGREEMENT WAS THAT EXCEPT FOR ONE COUNTY,
8 WHICH FOR SOME REASON I CAN'T IMAGINE MANAGED TO CONVINCING US
9 THEY SHOULD APPEAR SEPARATELY, OTHER THAN THAT, SOMEONE IS
10 SUPPOSED TO SPEAK FOR ALL THE COUNTIES.

11 **MS. WOODWARD:** THAT'S CORRECT, YOUR HONOR. WE
12 ACTUALLY HAD AN IDEA THAT WE COULD SPLIT THE 15 MINUTES AND WE
13 REALLY DO HAVE ONLY ABOUT THAT MUCH, IF THAT'S SOMETHING THE
14 COURT WOULD ENTERTAIN.

15 **JUDGE KARLTON:** THAT'S FINE.

16 **JUDGE REINHARDT:** TAKE 15 MINUTES AND SPLIT IT AND
17 STICK TO IT, YOU MAY DO THAT.

18 **MS. WOODWARD:** THANK YOU, YOUR HONOR. I WILL TAKE
19 SEVEN-AND-ONE-HALF MINUTES.

20 **JUDGE REINHARDT:** I WILL WATCH.

21 **MS. WOODWARD:** OKAY. YOUR HONORS, WHEN THE COUNTIES
22 INTERVENED, THE COURT HAD ALREADY MADE THE DECISION THAT THERE
23 WAS UNCONSTITUTIONAL SITUATIONS IN THE PRISONS, AND WE CAME IN
24 AND HAVE ACTED AS A SOMEWHAT SECONDARY PARTY.

25 WE HAD A SMALL ROLE IN THIS CASE. WE ARE NOT

1 CONCERNED OR WE ARE NOT PRESENTING EVIDENCE ON WHETHER
2 OVERCROWDING IS THE PRIMARY CAUSE OF THE UNCONSTITUTIONALITY OR
3 SOME OF THE OTHER ISSUES.

4 HOWEVER, THE REASON THAT WE INTERVENED WAS BECAUSE WE
5 NOTICED THAT AT THE TIME THAT THE COURT CONVENED THE
6 THREE-JUDGE PANEL, THE PARTIES WERE ASSUMING THAT AND WERE
7 SAYING THAT THE KINDS OF SOCIAL SERVICES THAT THE PEOPLE BEING
8 RELEASED FROM PRISON MIGHT NEED WOULD BEST BE PROVIDED AT THE
9 COUNTY LEVEL. AND WE AGREE WITH THAT.

10 WE THINK WE DO A GOOD JOB, BUT WE WERE VERY CONCERNED
11 BECAUSE WE ARE THE PROVIDERS OF LAST RESORT OF ALL OF THESE
12 SERVICES; MENTAL HEALTH FOR INDIGENTS, DRUG AND ALCOHOL,
13 HEALTHCARE, EMERGENCY SERVICES, HOUSING, HEALTH, JOB TRAINING
14 AND ESPECIALLY JAILS.

15 **JUDGE KARLTON:** MA'AM, I WANT YOU TO ASSUME THAT ALL
16 THREE JUDGES HAVE HEARD THE EVIDENCE AND HAVE ANXIETY
17 CONCERNING THE COUNTIES.

18 LET US ASSUME THE WORST, THAT MR. MELLO'S ANALYSIS IS
19 RIGHT AND WE CANNOT ORDER THE STATE TO SHARE ITS SAVINGS WITH
20 THE COUNTIES. DO YOU THINK THAT THAT MEANS THAT WE OUGHT TO
21 COUNTENANCE CONTINUED UNCONSTITUTIONAL CONDITIONS?

22 **MS. WOODWARD:** NO, YOUR HONOR. I DO NOT THINK SO AT
23 ALL. AND I AM HERE APOLOGIZING FOR NOT HAVING A COMPLETE
24 SOLUTION TO THIS PROBLEM BY ANY MEANS.

25 **JUDGE KARLTON:** YOU AREN'T ALONE.

1 **MS. WOODWARD:** RIGHT. I, AS I'M SURE THE COURT, HAVE
2 LOST SLEEP OVER THIS TRYING TO FIGURE OUT WHAT THE HECK TO DO.
3 AND AS A COUNTY, AS I SAY, WE ARE LOOKING AT THE SITUATION
4 WITHOUT FUNDING.

5 THE COURT HAS ACKNOWLEDGED THE STATE IS UNLIKELY TO
6 PROVIDE FUNDING FOR THESE SOCIAL SERVICES AND, YET, I -- THE
7 MOST THAT WE CAN DO IN THIS CASE PROBABLY IS TO HELP THE COURT
8 TO REMEMBER THAT WE ARE HERE AND WE HAVE THESE ISSUES AND I
9 JUST --

10 **JUDGE REINHARDT:** DO YOU HAVE A SUGGESTION FOR US?

11 **MS. WOODWARD:** WITH REGARD TO HOW TO GET FUNDING TO
12 COME TO THE COUNTIES?

13 **JUDGE REINHARDT:** NO, ABOUT WHAT TO DO.

14 **MS. WOODWARD:** YEAH. WELL, LET ME JUST STATE THAT
15 THE COUNTIES DO NOT HAVE A QUARREL WITH MANY OF THE
16 ALTERNATIVES TO JUST STAYING IN PRISON. WE DON'T HAVE A
17 QUARREL WITH PAROLE REALIGNMENT OR PAROLE -- SORRY, WHERE THE
18 COURT DOES NOT --

19 **JUDGE KARLTON:** PUTTING CERTAIN FOLKS OFF OF PAROLE.

20 **MS. WOODWARD:** EXACTLY. WE AGREE DIVERSION IS A GOOD
21 IDEA IN MANY CASES.

22 WE ALSO CERTAINLY AGREE THAT THESE EVIDENCE-BASED
23 PROGRAMS WORK. WE DO THEM IN OUR JAILS AND THEY WORK VERY
24 WELL.

25 AND THE PROBLEM, OF COURSE, AS THE COURT HAS HEARD IN

1 OUR TESTIMONY, SOME 50 PERCENT OF SAN MATEO COUNTY PRISONERS DO
2 NOT EVER GO TO JAIL. THEY STAY OUTSIDE AND DO THESE OTHER
3 PROGRAMS WITH GOOD SUCCESS.

4 NOW, THE PROBLEM THAT WE HAVE IS THAT IN THE
5 COMMUNITY, AS THE COURT HAS ALREADY HEARD, THERE ARE LONG WAIT
6 LISTS FOR ALL THESE PROGRAMS. OUR CONCERN IS GLOBAL.

7 WE LOOK AT THE PEOPLE WHO ARE GOING TO COME OUT AND
8 WE WORRY ABOUT THEM BECAUSE, AS YOU'VE HEARD ALSO THIS MORNING
9 AND THIS AFTERNOON, THESE PEOPLE WHO ARE COMING OUT OF JAIL
10 WITH MENTAL HEALTH PROBLEMS ARE FACING A LACK OF CONTINUITY OF
11 CARE BECAUSE THE COUNTY HAS A BIG WAIT LIST FOR THAT SORT OF
12 THING.

13 **JUDGE KARLTON:** YOU KNOW, THAT'S WHAT I TRIED TO SAY
14 TO YOU, APPARENTLY QUITE UNSUCCESSFULLY.

15 ASSUME THAT THIS COURT, THESE JUDGES, UNDERSTAND YOUR
16 PROBLEM.

17 **MS. WOODWARD:** YES.

18 **JUDGE KARLTON:** ASSUME THAT WE ARE FACED WITH A
19 CONSTITUTIONAL CONUNDRUM, WHICH IS THAT WE CAN'T ORDER THE
20 STATE TO DO WHAT ANY COMMON SENSE PERSON WOULD THINK WOULD BE
21 APPROPRIATE IF WE LET THEM OUT.

22 WHAT DO WE DO? DO WE -- WE CAN'T -- I MEAN, THE
23 SUGGESTION SEEMS TO BE THAT SOMEHOW OR OTHER WE ARE TO
24 COUNTENANCE SOME UNCONSTITUTIONAL CONDITIONS. THAT CAN'T BE
25 RIGHT.

1 **MS. WOODWARD:** NO. THAT CAN'T BE RIGHT, YOUR HONOR,
2 AND IT ALSO CANNOT BE RIGHT TO DO WHAT WE FEARED INITIALLY,
3 BECAUSE WE UNDERESTIMATED THE COURT, AND I WAS EXTREMELY
4 PLEASED TO HEAR THE COURT THIS MORNING COME OUT WITH EXACTLY
5 THE CONCERN THAT WE HAVE.

6 IT ALSO WOULD NOT BE THE SOLUTION TO SAY, LET'S HAVE
7 THE PEOPLE COME OUT INTO THE COMMUNITY WITHOUT DEALING WITH
8 THAT CONCERN, WITHOUT TAKING CARE OF THE FUNDING PROBLEM OR THE
9 NECESSITY FOR GRADUAL INCREASES.

10 WE HAVE THE INFRASTRUCTURE. THEN, OF COURSE, WE HAVE
11 THE DECOMPENSATION YOU'VE HEARD ABOUT. PEOPLE BEING HOMELESS,
12 THAT SORT THING. THEY COMMIT THE CRIMES, THEY GO BACK TO
13 PRISON AND WE ARE BACK TO WHERE WE STARTED. THAT'S NOT THE
14 SOLUTION EITHER.

15 AS I SAY, I'M SORRY I DON'T HAVE A GOOD SOLUTION OR
16 ANY AT ALL, BUT OUR REASON TO INTERVENE --

17 **JUDGE KARLTON:** WE BELIEVE YOU.

18 **MS. WOODWARD:** THE REASON TO INTERVENE AND THE REASON
19 THAT I'M STANDING HERE IS BECAUSE, IN THE WORDS OF OUR BELOVED
20 FORMER HEALTH DIRECTOR CHARLENE SILVA, WE ARE NOT SAYING WE
21 DON'T WANT THESE PEOPLE TO COME INTO OUR COMMUNITY. WE DO.
22 THEY ARE OUR PEOPLE. THEY ARE OUR FAMILIES. THEY BELONG TO
23 US. THEY SHOULD COME HOME.

24 ALL WE'RE ASKING IS THE COURT HELP US TO FIND A WAY
25 TO SERVE THESE PEOPLE IN A WAY THEY SHOULD BE SERVED.

1 **JUDGE KARLTON:** GOD WILLING AND THE RIVER DON'T RISE.

2 **MS. WOODWARD:** YES, EXACTLY. AN INCOMPLETE SOLUTION,
3 BUT THAT IS WHAT WE ARE ASKING THE COURT.

4 **JUDGE REINHARDT:** THANK YOU.

5 **CLOSING ARGUMENT**

6 **MS. FUENTES:** THANK YOU, YOUR HONORS, FOR LETTING
7 BOTH OF US SPEAK. I'M THERESA FUENTES FROM SANTA CLARA COUNTY.
8 YOUR HONORS, IF YOU ORDER A POPULATION REDUCTION
9 WITHOUT FUNDING TO THE COUNTIES, YOU WILL BE SHIFTING THE
10 PROBLEM TO THE COUNTIES. THE COUNTIES WILL HAVE THE
11 RESPONSIBILITY TO DEAL WITH ALL OF THE PEOPLE --

12 **JUDGE REINHARDT:** DO YOU THINK WE CAN ORDER THE STATE
13 TO GIVE MONEY TO THE COUNTIES FOR PROGRAMS?

14 **MS. FUENTES:** I HOPE YOU CAN. WE WOULD LOVE TO HAVE
15 THE MONEY. WE WOULD LOVE TO HAVE ENFORCEABLE FUNDING.

16 I DON'T HAVE THE ANSWER TO YOUR QUESTION. THE
17 PLAINTIFFS SAY NO, YOU CAN'T ORDER IT. THE STATE SAYS NO, YOU
18 CAN'T ORDER IT.

19 **JUDGE REINHARDT:** WELL, THE PLAINTIFFS WILL
20 RECONSIDER WHEN THEY GET TO THE PRACTICAL PROBLEM.

21 **JUDGE HENDERSON:** ISN'T THAT THE DILEMMA? WE'LL BE
22 ORDERING -- WE WILL BE SHIFTING THE PROBLEM TO THE COUNTIES?

23 **MS. FUENTES:** EXACTLY.

24 **JUDGE HENDERSON:** IF WE DON'T -- IF WE DO THAT, AS
25 JUDGE KARLTON SAID, WE WILL BE CONTINUING -- WELL, WE WOULD BE

1 CONFINED TO THESE UNCONSTITUTIONAL AS IT NOW EXISTS. SO WHAT
2 DO WE DO? WE ARE BUILDING WHAT -- HOW DO WE BALANCE THAT?

3 **MS. FUENTES:** WELL, I THINK FOR THIS COURT AND
4 LOOKING AT THE PUBLIC SAFETY, EVERY SINGLE PROPOSAL THAT THE
5 PLAINTIFFS HAVE PROPOSED FOR SAFELY RELEASING THE POPULATION
6 INVOLVED MONEY.

7 DIVERSION, THAT REQUIRES MONEY. COMMUNITY TREATMENT,
8 THAT REQUIRES MONEY. PAROLE REFORM. ALL OF IT. AND WE'VE
9 HEARD HERE, WE KNOW THAT THE STATE WILL NOT PROVIDE FUNDING.
10 I THINK --

11 **JUDGE KARLTON:** NO, WE DON'T KNOW THAT. SEE, THERE
12 IS A SOMEWHAT MORE SUBTLE POSTURE.

13 EVEN IF WE ASSUME THAT THE STATE -- THAT WE CANNOT
14 ORDER THE STATE TO FUND IT, WE CAN SAY TO THE STATE -- I'M NOT
15 SAYING WE ARE GOING TO, BUT WE CAN SAY TO THE STATE, THIS IS
16 YOUR CAP. YOU FIGURE OUT WHAT TO DO. YOU HAVE A
17 RESPONSIBILITY TO THE COMMUNITIES AND, YOU KNOW, TELL THEM TO
18 GIVE US A PLAN THAT INVOLVES THE SHARING OF SAVINGS. AND THEN
19 IF THEY DON'T DO IT, I DON'T KNOW WHAT WE DO NEXT.

20 **MS. FUENTES:** WELL, THAT'S THE PROBLEM. THAT'S THE
21 DILEMMA WE FACE.

22 THE COUNTIES -- YOU'VE HEARD MR. GRAVES, YOU HAVE TO
23 REMEMBER, TESTIFY THAT WE CAN'T TRUST THE STATE. NUMEROUS
24 TIMES THE STATE PROMISED US FUNDING AND DIDN'T GIVE IT TO US.
25 YOU KNOW, HE GAVE YOU NUMEROUS EXAMPLES.

1 AND, YOU KNOW, YOU CAN ORDER THE STATE TO COME UP
2 WITH A POPULATION REDUCTION. THE STATE CAN SAY, ALL RIGHT,
3 FINE. WE ARE GOING TO RELEASE WHO WE ARE GOING TO RELEASE AND,
4 COUNTIES, YOU DEAL, AND HERE IS NO MONEY AND DO IT. AND EVEN
5 THE PLAINTIFFS HAVE SAID THAT THAT'S NOT THE SAFE WAY OF
6 REDUCING THE POPULATION.

7 SO I JUST THINK THAT, YOU KNOW, THERE MIGHT -- IT
8 MIGHT VERY WELL BE THAT THERE IS NOT A SAFE WAY TO REDUCE THE
9 POPULATION.

10 **JUDGE KARLTON:** WHICH THEN BRINGS US TO A QUESTION
11 THAT I'VE ASKED THE DISTRICT ATTORNEY, WHICH IS: CAN THE
12 CONGRESS PROHIBIT THE FEDERAL GOVERNMENT, THE FEDERAL JUDICIARY
13 FROM RECTIFYING A CONSTITUTIONAL VIOLATION?

14 DO THEY HAVE THE POWER TO SAY WE CAN'T RELEASE THEM
15 BECAUSE RELEASING THEM AD HOC IS DANGEROUS AND YOU CAN'T ORDER
16 THE STATE TO SHARE THE BENEFITS OF THE SAVINGS?

17 **MS. FUENTES:** WELL, THERE IS A REASON THAT THE PLRA
18 SAID THE COURT MUST GIVE SUBSTANTIAL WEIGHT TO THE PUBLIC
19 SAFETY IMPASSE. AND IF THERE IS NOTHING YOU CAN DO UNDER THE
20 PLRA, WELL, THEN THERE ARE -- YOU CAN PURSUE OTHER AVENUES IN
21 THE INDIVIDUAL CASES.

22 **JUDGE KARLTON:** BUT, YOU KNOW, I HAVE BEEN AT IT FOR
23 12 YEARS. SO BEING TOLD THAT WE OUGHT TO PURSUE IT IN SOME WAY
24 IS -- AS WE FALL UPON, IT'S NOT A SYMPATHETIC ARGUMENT.

25 ALL RIGHT. I MEAN, THAT MAY BE ANOTHER UNANSWERABLE

1 QUESTION.

2 THANK YOU, MA'AM. I'M SORRY. I DIDN'T MEAN TO PLAY
3 YOU.

4 **MS. FUENTES:** I UNDERSTAND.

5 I DO WANT TO ADDRESS -- I FEEL LIKE I NEED TO ADDRESS
6 SOME OF THE STATEMENTS MADE BY THE PLAINTIFFS IN THEIR FINDINGS
7 OF FACT. THEY'VE HAD SAID THAT THE COUNTIES HAVE EXAGGERATED
8 THEIR EVIDENCE AND THE IMPACTS TO THE COUNTIES, AND I JUST WANT
9 TO ADDRESS THAT BRIEFLY.

10 I THINK THAT THEY HAVE TO SAY THAT BECAUSE THEY'VE
11 HAD NO EVIDENCE FROM ANY EXPERT THAT REFUTES ANYTHING THAT THE
12 COUNTIES HAVE SAID. THEY HAVE NO TESTIMONY ABOUT HOW COUNTIES
13 ARE FUNDED, HOW COUNTIES ARE RUN, HOW WE GET OUR MONEY.

14 YOU HEARD TESTIMONY FROM THE COUNTIES THAT WE DON'T
15 HAVE ANY DISCRETION ON HOW WE SPEND OUR FUNDS. WE HAVE VERY
16 LITTLE DISCRETION. MORE THAN HALF OF OUR FUNDING COMES FROM
17 STATE AND FEDERAL GOVERNMENT AND WE DON'T HAVE THE AUTHORITY ON
18 HOW TO ALLOCATE IT.

19 PLAINTIFFS HAVE SAID THAT THE STATE AND THE COUNTIES
20 HAVE MADE POLICY DECISIONS NOT TO FUND PROGRAMS, AND I TAKE
21 ISSUE WITH THAT BECAUSE SANTA CLARA COUNTY, FOR ONE, HAS MADE
22 GREAT EFFORTS TO PROVIDE THESE PROGRAMS.

23 THE BOARD OF SUPERVISORS HAS GIVEN -- IT'S A
24 SUBSTANTIAL PRIORITY OF THE BOARD OF SUPERVISORS TO PROVIDE
25 DRUG AND ALCOHOL AND MENTAL HEALTH SERVICES TO RESIDENTS OF

1 SANTA CLARA COUNTY. IN FACT, WE HAVE A VERY SUCCESSFUL
2 PROGRAM, DRUG TREATMENT PROGRAM IN OUR COUNTY. AND THERE IS
3 TESTIMONY THAT WE REDUCED OUR TOTAL JAIL POPULATION BY 20
4 PERCENT BECAUSE OF OUR PROGRAM.

5 THE STATE DOESN'T FUND ALL OF THAT. I THINK THE
6 COUNTY PAYS ONE-HALF, ALMOST ONE-HALF OF THE MONEY ON THE
7 COUNTY'S DISCRETIONARY FUND BECAUSE THE STATE DOESN'T GIVE US
8 ENOUGH MONEY FOR THOSE PROGRAMS.

9 WHAT WILL HAPPEN TO THOSE PROGRAMS IF PAROLEES ARE
10 RELEASED? I DON'T KNOW.

11 **JUDGE REINHARDT:** WHAT WILL HAPPEN IF THE STATE SAYS
12 NEXT YEAR, LOOK, WE DON'T HAVE ENOUGH MONEY?

13 **MS. FUENTES:** WELL, THEY HAVE BEEN DOING THAT
14 GRADUALLY. RIGHT NOW, AS WE SPEAK, THE STATE IS CUTTING
15 FUNDING TO THE COUNTIES. THEY'RE CUTTING A LOT OF FUNDING FOR
16 MENTAL HEALTH AND FOR DRUG AND ALCOHOL. AND WE JUST SERVE LESS
17 AND LESS PEOPLE AND THE WAIT LISTS GET LONGER AND LONGER.

18 A POPULATION REDUCTION WILL JUST REALLY MAKE A BAD
19 SITUATION ENORMOUSLY WORSE. THAT'S KIND OF WHAT WE ARE STUCK
20 WITH.

21 WE HAVE AN EVER INCREASING POT OF FUNDS TO PROVIDE
22 SERVICES, THAT WE HAVE TO PROVIDE SERVICES FOR EVERYBODY IN THE
23 COMMUNITY. AND THE MORE PRISONERS THAT GET RELEASED AND GET
24 PUT ONTO THE COUNTIES, THE LESS SERVICES WE ARE ABLE TO GIVE TO
25 THE GENERAL POPULATION AND THE MORE THE SAFETY NET GETS ERODED.

1 AND THAT'S OUR CONCERN AND THAT'S WHY WE INTERVENED,
2 TO POINT OUT TO THE COURT IT REALLY IS SIGNIFICANT. GRAVE
3 PROBLEMS THAT THE COUNTIES WILL FACE WITH THE PRISON POPULATION
4 ISSUES AND NO FUNDING.

5 **JUDGE REINHARDT:** THERE IS A GRAVE PROBLEM WITH OR
6 WITHOUT THE PRISONER RELEASE ORDER.

7 **MS. FUENTES:** IT'S A PROBLEM NOW, YES, AND WE ARE
8 DOING THE BEST WE CAN.

9 **JUDGE REINHARDT:** IT GETS GRAVER EVERY YEAR.

10 **MS. FUENTES:** AND IT GETS WORSE EVERY YEAR.

11 **JUDGE REINHARDT:** OKAY.

12 **MS. FUENTES:** THANK YOU.

13 **CLOSING ARGUMENT**

14 **MS. KECK:** GOOD AFTERNOON, YOUR HONORS. IT'S ANN
15 KECK, DEPUTY COUNTY COUNSEL OF SONOMA COUNTY. I REPRESENT IN
16 THIS MATTER NOT ONLY THE COUNTY OF SONOMA, BUT SONOMA COUNTY
17 SHERIFF WILLIAM COGBILL, DISTRICT ATTORNEY STEPHAN PASSALACQUA
18 AND CHIEF PROBATION OFFICER WILLIAM OCHS -- PARDON ME, ROBERT
19 OCHS.

20 AND THE REASON THAT THE COURT ALLOWED US TO INTERVENE
21 AS A SEPARATE GROUP WAS BECAUSE MY CLIENTS HAVE A VERY UNIQUE
22 POSITION.

23 **JUDGE KARLTON:** I'M GOING TO INTERRUPT. WE HEARD
24 YOUR CLIENTS. WE HEARD YOUR EXPERT. LET'S TALK ABOUT WHERE WE
25 ARE NOW. YOUR EXPERT REALLY, AS I UNDERSTAND IT, ESSENTIALLY

1 AGREES WITH THE PLAINTIFFS AND WITH THOSE COUNTIES THAT HAVE
2 SUGGESTED ALL OF THESE PROGRAMS.

3 IF THE COURT CANNOT ORDER THE STATE TO SHARE SAVINGS,
4 WHAT ARE WE TO DO? DON'T TELL US ABOUT ALL THE WONDERFUL
5 THINGS YOU ARE DOING. THAT'S BESIDE THE POINT. WHAT DO WE DO?

6 **MS. KECK:** I UNDERSTAND, YOUR HONOR. AND THE REASON
7 THAT WE ARE HERE WAS TO TELL ABOUT THE IMPACTS TO THE LOCAL
8 COMMUNITY --

9 **JUDGE KARLTON:** WE KNOW ABOUT IT. WE BELIEVE IN IT.
10 TELL ME WHAT I'M SUPPOSED TO DO.

11 **MS. KECK:** AS FAR AS I SEE, THERE ARE REALLY ONLY TWO
12 OPTIONS, YOUR HONOR. THE FIRST IS TO ENTER A PRISONER RELEASE
13 ORDER THAT WOULD BE CONSISTENT WITH OUR FINDINGS OF FACT AND
14 PROPOSALS FOR RELIEF, WHICH BASICALLY ORDERS THE COURT TO COME
15 UP WITH A PLAN.

16 **JUDGE KARLTON:** ORDER THE STATE TO COME UP WITH A
17 PLAN?

18 **MS. KECK:** PARDON ME. ORDER THE STATE TO COME UP
19 WITH A PLAN.

20 THE PROBLEM THAT WE GET AT THAT POINT IS THAT THE
21 PLAN ISN'T SUFFICIENT FOR WHATEVER PURPOSES. WHAT KIND OF, I
22 WILL TERM IT A HAMMER. WHAT KIND OF HAMMER CAN THE COURT BRING
23 DOWN IF THE STATE IS UNABLE TO COMPLY WITH THAT? AND THAT'S
24 WHERE WE COME INTO THE PROBLEM.

25 BECAUSE A PRISON POPULATION CAP AND THE NUMBER THAT

1 THE PLAINTIFFS HAVE SUGGESTED IS DEVASTATING, A RELEASE OF A
2 THIRD OF THE PRISON POPULATION WOULD JUST BRING UTTER CHAOS IN
3 THE COMMUNITIES.

4 YOUR HONOR HAS SUGGESTED THAT PERHAPS WE SHOULD HAVE
5 BEEN LOOKING AT DIFFERENT NUMBERS AND DIFFERENT TIMES, WHICH
6 WOULD HAVE MADE US FOCUS ON REALLY A UNIVERSE OF POSSIBILITIES,
7 BUT I WOULD PRESENT TO THE COURT THAT ALTHOUGH THERE HASN'T
8 BEEN TESTIMONY ON THIS, TO ANY GREAT EXTENT, REALLY IT IS A
9 SLIDING SCALE.

10 THERE IS A CERTAIN POINT AT WHICH THE PRISON
11 POPULATION CAP WOULD NOT CAUSE A SIGNIFICANT OR A VERY
12 APPRECIABLE IMPACT ON COMMUNITIES. IT'S CERTAINLY NOT IN THE
13 NATURE OF THE 50,000 THAT THEY REQUESTED. IT'S PROBABLY NOT IN
14 THE NATURE OF THE 35,000 THAT WAS THE SECONDARY POSITION THAT
15 DR. AUSTIN CAPPED -- TALKED ABOUT.

16 WE DON'T HAVE ANY KIND OF TESTIMONY AS TO WHAT WOULD
17 BE A NOMINAL IMPACT -- OR A PRISON RELEASE THAT WOULD HAVE A
18 NOMINAL IMPACT ON PUBLIC SAFETY AND THE OPERATION OF CRIMINAL
19 JUSTICE SYSTEMS.

20 AND I WOULD SUBMIT THAT I WOULD -- CONTRARY, I THINK,
21 TO MAYBE SOME OF THE OTHER COUNTY INTERVENORS, I WOULD SUBMIT
22 THAT IF THE COURT IS UNABLE TO COME UP WITH A FIGURE THAT SHOWS
23 THAT THE IMPACT ON THE COUNTIES WOULD BE NEGLIGIBLE AND THAT
24 THE BENEFIT TO BE DERIVED FROM THAT PRISON POPULATION CAP WOULD
25 OUTWEIGH THOSE BAD EFFECTS, THAT THE COURT SHOULD NOT ENTER ANY

1 KIND OF POPULATION CAP.

2 **JUDGE KARLTON:** SO YOUR VIEW IS THAT THE COURT SHOULD
3 SIMPLY COUNTENANCE AN UNCONSTITUTIONAL CONDITION. NOBODY IN
4 THE COUNTY IS PERMITTED TO SPEAK ON ANY PUBLIC ISSUE. JUST A
5 STATUTE THAT THE STATE PASSED THAT SAID, IN SONOMA COUNTY
6 NOBODY CAN SPEAK ON A PUBLIC ISSUE. AND WE HAVE TO SAY, THAT'S
7 LIFE.

8 **MS. KECK:** AND, YET, YOUR HONOR HAS ASKED THE
9 QUESTION AS TO WHETHER OR NOT CONGRESS CAN ORDER THIS COURT NOT
10 TO ENFORCE A CONSTITUTIONAL RIGHT. AND I WOULD SAY WE NEED TO
11 LOOK TO THE, YOU KNOW, THE SCRUTINY ANALYSIS THAT THE COURTS
12 EMPLOY TO DETERMINE WHETHER OR NOT A LAW CAN CONSTITUTIONALLY
13 INFRINGE ON SOMEONE'S RIGHTS.

14 I MEAN, IN THE JAIL, THE JAIL MANAGEMENT INFRINGES ON
15 CONSTITUTIONAL RIGHTS ON PRACTICALLY A DAILY BASIS. WE READ
16 PEOPLE'S MAIL. WE PREVENT THEM FROM BEING FREE TO LEAVE. BUT
17 THE ANALYSIS APPLIES. IT'S A RATIONAL RELATIONSHIP TEST WITH
18 RESPECT TO GEO-MANAGEMENT ISSUES THAT ALLOWS THE JAIL TO
19 INFRINGE UPON CONSTITUTIONAL RIGHTS IF THEY HAVE A LEGITIMATE
20 INTEREST.

21 CONGRESS HAS GIVEN THIS COURT --

22 **JUDGE KARLTON:** THAT IS NOT THE APPROPRIATE
23 CONSTITUTIONAL ANALYSIS, BUT IT DOESN'T MATTER. JUST GO AHEAD.

24 **MS. KECK:** ASIDE FROM EQUAL PROTECTION ISSUES, WHICH
25 IS STRICTLY -- THE JAIL MANAGEMENT ISSUES ARE SUBJECT TO THE

1 RATIONAL RELATIONSHIP TEST.

2 BUT IF YOU GO AND LOOK AT THE STATUTE, CONGRESS HAS
3 GIVEN DIRECTION TO THIS COURT TO TAKE INTO ACCOUNT PUBLIC
4 SAFETY AND OPERATION OF THE CRIMINAL JUSTICE SYSTEMS.

5 AND SO I BELIEVE IT'S INTENDANT UPON THIS COURT TO GO
6 AND WEIGH THE EFFECTS OF THOSE SYSTEMS VERSUS THE
7 CONSTITUTIONAL VIOLATIONS.

8 **JUDGE REINHARDT:** IT SAYS WE SHOULD CONSIDER THE
9 FEDERAL CIRCUIT ON PUBLIC SAFETY. IT DOESN'T SAY PUBLIC SAFETY
10 OUTWEIGHS THE CONSTITUTION --

11 **MS. KECK:** NO. IT LEAVES TO THIS COURT THE ABILITY
12 TO SAY THAT THE EFFECTS OF PUBLIC SAFETY AND THE OPERATION OF
13 CRIMINAL JUSTICE SYSTEMS ARE MORE WEIGHTY THAN THE SOLVENCY
14 THAT YOU WOULD GET FROM A PRISONER RELEASE ORDER.

15 WE HAVE THE PLAINTIFFS ADMITTING IT'S NOT GOING TO
16 SOLVE THE VIOLATION, BUT IT'S A --

17 **JUDGE KARLTON:** EVERY DAY, EVERY DAY PEOPLE DIE IN
18 THE PRISONS, DIE IN THE PRISONS BECAUSE OF INADEQUATE HEALTH OR
19 MENTAL HEALTH CARE. WHAT OUTWEIGHS THAT?

20 **MS. KECK:** I WISH I COULD COME UP WITH A SOLUTION FOR
21 THAT, YOUR HONOR. THE EVIDENCE SHOWS THAT YOU WOULD LOSE --
22 THE EVIDENCE THAT THE COUNTIES HAVE GIVEN IS THAT IT WOULD BE
23 CATASTROPHIC ON A COUNTY LEVEL, THAT WE WOULD HAVE FAILURE TO
24 PROVIDE SERVICES.

25 DAVID BENNETT SAYS THAT YOU WOULD HAVE A LOSS OF

1 SYSTEM INTEGRITY. WE WOULD BASICALLY LOSE THE ABILITY TO HAVE
2 THE CRIMINAL JUSTICE SYSTEM FUNCTION WELL IN THE COUNTY IF YOU
3 WOULD HAVE A POPULATION CAP THAT WOULD BE SO DEVASTATING THAT
4 IT WOULD OVERWHELM THE SYSTEM. SO WE HAVE, I GUESS, A LOSS OF
5 SYSTEM INTEGRITY --

6 **JUDGE KARLTON:** I EXAGGERATED. IT'S EVERY WEEK
7 PEOPLE DIE.

8 **MS. KECK:** YOUR HONOR, I CERTAINLY DO NOT MEAN TO
9 UNDERMINE THE SEVERITY OF THE CONSTITUTIONAL VIOLATION. THIS
10 COURT HAS REPEATEDLY SAID HOW GRAVE IT CONSIDERS THE SITUATION.

11 I ALSO DO NOT INTEND TO UNDERMINE THE SEVERITY OF THE
12 OVERCROWDING AND THE FAILURE TO TAKE ACTION TO REMEDY THOSE
13 ISSUES.

14 BUT FROM THE EVIDENCE THAT WAS PRESENTED TO THE
15 COURT, IT DOES NOT APPEAR THAT A POPULATION CAP BY ITSELF IS
16 THE MECHANISM TO GO ABOUT RESOLVING THAT, BECAUSE OF THE LACK
17 OF GUARANTEE THAT THERE WOULD BE ANY KIND OF THE REMEDIAL
18 PROCEDURES THAT EVEN PLAINTIFFS ADMIT WOULD BE NECESSARY --

19 **JUDGE REINHARDT:** IF YOU CAN'T SOLVE IT WITHOUT DOING
20 THAT, IT MAY NOT SOLVE IT. BUT YOU HAVE TO DO IT AS YOU'RE
21 GOING TO SOLVE IT.

22 **JUDGE KARLTON:** YOU CAN'T SOLVE IT WITHOUT...

23 **MS. KECK:** I UNDERSTAND. IN FACT, I BELIEVE MY
24 EXPERT, DAVID BENNETT, AGREED THAT THE PROBLEMS ARE IMPOSSIBLE
25 TO SOLVE WITHOUT REDUCING THE -- WITH POPULATION.

1 THE INSTRUCTIONS OF CONGRESS FOR THIS COURT TO LOOK
2 CAREFULLY AT THE PUBLIC SAFETY AND CRIMINAL JUSTICE SYSTEM
3 FACTORS IS I KNOW WHAT IS STUMPING THIS COURT.

4 IF THERE WERE AN EASY ANSWER, EVERY SINGLE ONE OF THE
5 EXPERTS THAT THIS PANEL QUESTIONED WOULD HAVE COME UP WITH THE
6 ANSWER. BECAUSE I KNOW THAT THIS COURT CHALLENGED VIRTUALLY
7 EVERY EXPERT TO SAY, WHAT DO WE DO IF THERE IS NO EASY ANSWER.
8 THERE IS NO EASY ANSWER, AND FAR BE IT FROM ME TO SAY THAT I
9 HAVE COME UP WITH ONE.

10 BUT THE ISSUE IS THAT WE HAVE RESEARCHED AND THE
11 EVIDENCE THAT WE HAVE PUT IN FRONT OF THE COURT IS THAT SIMPLY
12 A POPULATION CAP WOULD BE DEVASTATING ON OUR LOCAL COMMUNITIES.
13 WE WOULD NOT ONLY FAIL TO BE ABLE TO SERVE THE PEOPLE WHO
14 CURRENTLY ARE SERVING, BUT --

15 **JUDGE REINHARDT:** SO WHAT IS THE SUGGESTION? WE DO
16 NOTHING?

17 **MS. KECK:** WELL, YOUR HONOR, AS I SAID, THERE ARE
18 ISSUES THAT RIGHT NOW WE ARE CAUGHT A LITTLE BIT BETWEEN A ROCK
19 AND HARD PLACE BECAUSE WE HAVE A RELEASE OF 50,000 --

20 **JUDGE REINHARDT:** NOT NECESSARILY.

21 **MS. KECK:** OR -- WELL, THEN -- AND MY -- I STARTED
22 OFF IN RESPONDING TO JUSTICE KARLTON'S STATEMENTS BY SAYING
23 THERE IS A SLIDING SCALE HERE. WE HAVE NOT ADDRESSED A
24 UNIVERSE OF POSSIBILITY.

25 FRANKLY, IT WOULD BE DIFFICULT FOR US AS AN

1 INTERVENOR FOR US TO ADDRESS A UNIVERSE OF POSSIBILITIES.

2 BUT THERE ARE OTHER POSSIBILITIES OUT THERE THAT
3 COULD RESULT IN NOT AS DRAMATIC AN IMPACT ON THE COUNTIES AS A
4 RELEASE OF 50,000.

5 **JUDGE REINHARDT:** WHY HAVEN'T THOSE POSSIBILITIES
6 BEEN MADE REALITY? WHAT MAKES YOU THINK THEY ARE GOING TO BE?

7 **MS. KECK:** WELL, THE STATE HAS GONE AND IMPLEMENTED,
8 I KNOW, A NUMBER OF REFORMS. MY EXPERT TESTIFIED THAT THERE
9 HAD BEEN A FEW OF THEM THAT HAVE NOT BEEN COMPLETELY
10 IMPLEMENTED, SOME OF THEM HAVE BEEN. BUT IT MAY BE AWHILE FOR
11 US TO SEE THE RESULTS.

12 **JUDGE REINHARDT:** HOW LONG HAS JUDGE HENDERSON BEEN
13 WAITING?

14 **MS. KECK:** PARDON?

15 **JUDGE REINHARDT:** HOW LONG HAS JUDGE HENDERSON BEEN
16 WAITING?

17 **MS. KECK:** I GUESS HE HAS BEEN WAITING PROBABLY ABOUT
18 EIGHT YEARS NOW.

19 **JUDGE REINHARDT:** HOW LONG HAS JUDGE KARLTON BEEN
20 WAITING?

21 **MS. KECK:** OH, I THINK IT'S PROBABLY ABOUT 17,
22 ALTHOUGH I UNDERSTAND THINGS HAVE BEEN DONE IN THOSE 17 YEARS.

23 **JUDGE REINHARDT:** AND HOW MUCH LONGER SHOULD WE WAIT
24 AND ALLOW THE CONSTITUTIONAL VIOLATION TO CONTINUE?

25 **MS. KECK:** I HAVE NO ANSWER TO THAT QUESTION, YOUR

1 HONOR.

2 **JUDGE HENDERSON:** DO I UNDERSTAND YOUR ARGUMENT,
3 COUNSEL, THAT PLAINTIFF IS ASKING FOR 52,000 AND DOING NOTHING
4 HERE. AND WE TRY TO FIND A NUMBER. THE TEST FOR US IS HOW
5 IT'S NOW HURTING THE COUNTIES. I KNOW I'M SIMPLIFYING. IS
6 THAT WHAT YOU'RE SUGGESTING?

7 **MS. KECK:** I GUESS THE ANSWER IS YES. THERE IS A --
8 JUST AS THE COURT WAS ASKING, WHERE DOES IT GET SO BAD IN
9 OVERCROWDING THAT WE HAVE TO ENTER AN ORDER?

10 YOU CAN TO TURN THAT SAME ARGUMENT ON ITS HEAD.
11 WHERE IS THE LINE ON THE SPECTRUM OF CONTINUUM WHERE WE GET A
12 GOOD BALANCE OF HAVING A RELEASE THAT DOES SOMETHING TO EFFECT
13 THE ABILITY TO PROVIDE CONSTITUTIONALLY ADEQUATE MEDICAL AND
14 MENTAL HEALTH CARE?

15 BUT WE DON'T HAVE THE KIND OF SEVERE IMPACTS THAT WE
16 CAN SEE AT THE COUNTY LEVEL.

17 NOW, AGAIN, IT'S VERY DIFFICULT TO TALK ABOUT THE
18 UNIVERSE OF POSSIBILITIES AND TO PRESENT EVIDENCE ON THIS. I'M
19 NOT SURE THERE IS EVIDENCE THAT HAS BEEN PRESENTED THAT THE
20 COURT COULD ADEQUATELY GO AND ASSESS THAT KIND OF LINE DRAWING,
21 THE CONTINUUM DETERMINATION.

22 BUT IN THE UNIVERSE OF POSSIBILITIES, THAT IS THE
23 ISSUE. BUT WE WERE PROVIDED WITH A VERY SPECIFIC REQUEST FOR
24 RELIEF, WHICH WAS THE 50,000, ONE-THIRD PRISON POPULATION
25 RELIEF. AND SO THAT IS WHAT WE HAD TO TAKE TO OUR CLIENTS, AND

1 THAT IS WHAT WE HAD TO GIVE TO OUR EXPERT TO BE ABLE TO PRESENT
2 TO THE COURT.

3 THERE WAS -- ALTHOUGH THERE WAS TESTIMONY ABOUT SOME
4 LESSER NUMBERS, IT WASN'T PROVIDED TO US IN SUFFICIENT TIME TO
5 PREPARE EXPERT REPORTS ON IT OR GET INFORMATION FROM THE COURT.
6 SO WE HAVE NOT ADDRESSED THE SPECTRUM OF CONTINUUM QUESTION AS
7 TO WHETHER OR NOT OR WHERE.

8 AND I'M ASSUMING THAT THERE IS. I'M ASSUMING THAT
9 THERE'S A 5,000 RELEASE OF PRISONERS, WHICH MAY GIVE
10 JUDGE KARLTON HIS 1,000 BEDS, BUT THAT IMPACT ON THE 58
11 COUNTIES PROBABLY WOULD NOT BE THAT GREAT.

12 BUT WHERE BETWEEN THE 5,000 RELEASE AND THE 50,000
13 RELEASE WE COULD GET THE PARTIES TO AGREE IS SOMETHING THAT
14 THERE WAS NO TESTIMONY ABOUT. I'M CERTAINLY NOT GOING --

15 **JUDGE REINHARDT:** THAT'S WHY WE HAVE SETTLEMENT
16 DISCUSSIONS AND NEGOTIATIONS.

17 **MS. KECK:** AND WE DID GO THROUGH ABOUT SEVEN MONTHS
18 OF THOSE, YOUR HONOR.

19 **JUDGE REINHARDT:** THAT WOULD HAVE BEEN A GOOD WAY TO
20 SOLVE THIS PROBLEM.

21 **MS. KECK:** I WHOLEHEARTEDLY AGREE.

22 **JUDGE KARLTON:** IT MAY BE THE ONLY WAY.

23 **MS. KECK:** PARDON ME, YOUR HONOR?

24 AND, YOU KNOW, THIS COURT DOES HAVE ITS HANDS TIED.

25 **JUDGE REINHARDT:** WELL, THEY ARE NOT ALL THAT TIED.

1 **MS. KECK:** WELL, TIED WITH RESPECT FROM THE COUNTY'S
2 PERSPECTIVE, AT LEAST, BECAUSE WE HAVE PEOPLE WHO DO WANT TO
3 PROVIDE DIVERSION SERVICES. WE WANT TO SERVE THESE
4 POPULATIONS. WE SIMPLY DON'T HAVE THE FUNDING AND ABILITY TO
5 DO SO. AND ABSENT THAT, THE IMPACT ON US IS TOO GREAT.

6 **JUDGE HENDERSON:** THANK YOU.

7 I KNOW YOU DON'T SPEAK FOR THE LARGER COUNTIES, BUT
8 ANOTHER DILEMMA -- AND MAYBE YOU HAVE SOME ADVICE ON IT -- IS
9 400 PEOPLE UNDER WHATEVER WE MIGHT DO TO L.A. COUNTY IS NOT
10 SUCH A BIG DEAL. IT WILL SWAMP THE COUNTY UP NEAR THE OREGON
11 BORDER.

12 HOW DO YOU FEEL WITH THAT IN TRYING TO DO SOMETHING
13 THAT'S REASONABLE?

14 **MS. KECK:** WELL, YOUR HONOR, THAT IS A DIFFICULT
15 QUESTION.

16 ONE OF THE THINGS THAT HAS COME UP DURING THE COURSE
17 OF THIS IS THAT IT IS THE OBLIGATION OF THE CDCR TO DETERMINE
18 HOW TO RELEASE, HOW TO PAROLE, ET CETERA.

19 I'M NOT SURE THAT THIS COURT WOULD BE IN A POSITION
20 TO BE ABLE TO MAKE SPECIFIC DETERMINATIONS AS TO WHICH TYPES OR
21 HOW MANY INMATES TO RELEASE TO VARIOUS COUNTIES. AND THE
22 FACTORS THAT YOU HAVE TO GO THROUGH TO ANALYZE THAT, THE RISK
23 NEEDS ASSESSMENT OF THE INMATES, THE POPULATION AND
24 AVAILABILITY OF RESOURCES IN THE COUNTY WOULD, I'M SURE, BE FAR
25 MORE THAN THIS COURT WOULD WANT TO TAKE EVIDENCE ON AND

1 CONSIDER IN THE PROCESS.

2 JUDGE REINHARDT: ALL RIGHT. I THINK WE HAVE GONE AS
3 FAR AS WE CAN GO.

4 THANK YOU VERY MUCH, COUNSEL.

5 MS. KECK: THANK YOU.

6 JUDGE REINHARDT: HOW MANY INTERVENORS ARE LEFT?

7 MS. KECK: ONE.

8 MS. BARLOW: ONE.

9 JUDGE REINHARDT: ALL RIGHT. WHO?

10 MS. KECK: THE LEGISLATOR.

11 JUDGE KARLTON: OH, OKAY.

12 MR. KAUFHOLD: GOOD AFTERNOON, YOUR HONORS.

13 JUDGE REINHARDT: HOW COULD WE FORGET YOU?

14 **CLOSING ARGUMENT**

15 MR. KAUFHOLD: GOOD AFTERNOON, YOUR HONORS. STEVE
16 KAUFHOLD FROM AKIN, GUMP, STRAUSS, HAUER AND FELD FOR THE
17 LEGISLATIVE INTERVENORS.

18 I KNOW THAT THE HOUR IS GETTING LATE. I HAVE NO
19 DESIRE TO REPEAT WHAT THE DEFENDANTS HAVE ALREADY SAID OR THE
20 MATERIAL IN OUR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF
21 LAW.

22 THERE ARE TWO THINGS THAT I WANTED TO ADDRESS FROM
23 YOUR DISCUSSION THIS MORNING WITH THE PLAINTIFFS' COUNSEL AND,
24 IN PARTICULAR, TO GO BACK, JUDGE REINHARDT, TO KIND OF A
25 HYPOTHETICAL OR A QUESTION THAT YOU RAISED.

1 AND ONE OF THE THINGS THAT CAME UP WAS, SAY THERE ARE
2 FIVE CAUSES OF THE DIFFICULTIES THAT ARE FACED. ONE OF THEM IS
3 OVERCROWDING, BUT THERE'S FOUR OTHER THINGS. AND WHAT I
4 BELIEVE --

5 **JUDGE REINHARDT:** AND OVERCROWDING IS THE PRIMARY
6 CAUSE?

7 **MR. KAUFHOLD:** AND FOR THIS AFTERNOON ONLY, I WILL
8 ASSUME THAT. THAT'S THE PRIMARY CAUSE, YOUR HONOR.

9 **JUDGE REINHARDT:** FOR THE HYPOTHETICAL QUESTION.

10 **MR. KAUFHOLD:** FOR THE HYPOTHETICAL QUESTION, THAT'S
11 RIGHT.

12 I BELIEVE COUNSEL'S RESPONSE WAS, YES, IT'S STILL
13 PROPER TO ENTER A PRISONER RELEASE ORDER IN THE FIRST INSTANCE
14 AS A FIRST STEP. AND WE THINK, YOUR HONOR, THAT IS 100 PERCENT
15 WRONG; THAT THAT PUTS THE CART BEFORE THE HORSE AND THAT THIS
16 COURT HAS AN OBLIGATION UNDER THE PRISONER LITIGATION REFORM
17 ACT TO TAKE THE PRELIMINARY STEPS, WHETHER IT'S DONE BY THE
18 INDIVIDUAL COURTS IN THE UNDERLYING ACTIONS OR, FRANKLY, I'M
19 NOT SO SURE THAT THIS COURTS HANDS ARE AS TIED AS SOME OF THE
20 OTHER PARTIES THOUGHT IN TERMS OF ORDERING OTHER RELIEF SHORT
21 OF A PRISONER RELEASE ORDER.

22 THOSE OTHER FOUR FACTORS NEED TO BE ADDRESSED --

23 **JUDGE KARLTON:** COUNSEL, WHAT WE HAVE BEEN TOLD, AT
24 LEAST BY THE PLAINTIFFS' EXPERTS -- AND AS BEST I CAN TELL,
25 NOBODY REALLY DISAGREES -- IS ALL OF THE OTHER THINGS THAT

1 SHOULD BE DONE AND CAN BE DONE WILL FAIL UNLESS THERE IS A
2 PRISONER RELEASE ORDER.

3 I HAVE MADE ORDERS CONCERNING BEDS. I HAVE MADE
4 ORDERS CONCERNING THE BAY OF PROFESSIONALS. I HAVE MADE ORDERS
5 CONCERNING THE NUMBER OF CUSTODIAL PERSONS. ALL OF THOSE
6 THINGS ARE GOING ON.

7 WHAT THE SPECIAL MASTER HAS TOLD ME WHAT NOBODY ELSE
8 HAS DISAGREED WITH IS ALL THE WONDERFUL PROGRESS THAT MISS
9 TILLMAN THINKS IS GOING TO SOMEHOW OR OTHER JUSTIFY WHERE WE
10 ARE NOW WILL FAIL, ARE IN DANGER OF FAILING BECAUSE
11 OVERCROWDING WILL OVERTAKE EVERYTHING.

12 IT'S NOT THAT THESE THINGS CAN'T BE DONE. IT'S THAT
13 THEY WILL NOT BE EFFECTIVE -- THAT IT APPEARS THAT THEY WILL
14 NOT BE EFFECTIVE UNLESS THERE IS A LIMITATION ON THE NUMBER OF
15 PEOPLE IN THE PRISONS. THAT'S THE PROBLEM.

16 **MR. KAUFHOLD:** I THINK I UNDERSTAND THE PROBLEM, YOUR
17 HONOR, AND THE POINT THAT WE WANT TO MAKE 100 PERCENT CLEAR --
18 AND IT MAY BE THAT WHAT YOUR HONOR IS TELLING ME IS THAT THIS
19 HAS BEEN DONE -- IS THAT IF THERE ARE FIVE REMAINING FACTORS
20 THAT NEED TO BE ADDRESSED AND OVERCROWDING IS ONE OF THEM, WE
21 NEED TO DEAL WITH ONE, TWO, THREE AND FOUR FIRST. THAT'S WHAT
22 THE LITIGATION REFORM ACT REQUIRES.

23 IF YOUR HONOR IS SAYING THAT THEY HAVE ALL BEEN
24 DONE --

25 **JUDGE KARLTON:** LET'S ASSUME THAT THERE HAVE BEEN --

1 AT LEAST IN MY OPINION, AND I SUSPECT IN JUDGE HENDERSON'S CASE
2 AS WELL, THEY HAVE ALL BEEN -- THERE HAVE BEEN ORDERS ON ALL
3 THE OF THEM.

4 **JUDGE REINHARDT:** THE STATUTE SAYS THAT WE CAN'T
5 ISSUE A PRISONER RELEASE ORDER UNLESS CROWDING IS THE PRIMARY
6 CAUSE OF THE VIOLATION AND NO OTHER RELIEF WILL REMEDY THE
7 VIOLATION.

8 NOW, I THINK WE ALL AGREE THAT EVEN IF THERE ARE
9 THREE OR FOUR OTHER CAUSES, SOLVING THOSE WILL NOT REMEDY THE
10 VIOLATION, BECAUSE THERE WOULD STILL BE OVERCROWDING.

11 SO YOUR -- IT'S SAFE TO SAY UNDER YOUR THEORY YOU
12 HAVE TO DO THE OTHER CAUSES FIRST, BUT THAT'S NOT WHAT I SEE
13 THE STATUTE AS SAYING. IT SAYS YOU DO THE OVERCROWDING, IF
14 IT'S A PRIMARY CAUSE, NOT AS LONG AS YOU -- YOU DO IT IF NO
15 OTHER RELIEF WILL REMEDY IT. AND YOUR OTHER CAUSES WILL NOT
16 REMEDY IT AS LONG AS IT'S OVERCROWDING.

17 **JUDGE KARLTON:** AS LONG AS THERE IS OVERCROWDING.

18 **MR. KAUFHOLD:** AND I THINK THE POINT, YOUR HONOR, IS
19 WE ARE VERY CONCERNED ABOUT THOSE TWO ELEMENTS BEING CONFLATED
20 BECAUSE EVEN IF SOMETHING IS THE PRIMARY CAUSE, WE BELIEVE THAT
21 YOU DO NEED TO EXHAUST THOSE OTHER FOUR ISSUES BEFORE YOU WOULD
22 DO A PRISONER RELEASE ORDER BECAUSE WE DON'T KNOW TO A
23 CERTAINTY UNTIL THE OTHER POSSIBILITIES HAVE BEEN KNOCKED OUT
24 WHETHER --

25 **JUDGE KARLTON:** WE DON'T KNOW FOR CERTAINTY ANYTHING.

1 WE CAN MAKE REASONABLE --

2 **JUDGE REINHARDT:** I'M SURE WE DO KNOW IF WE SAY IT'S
3 THE PRIMARY CAUSE. THEN WE DO KNOW THAT THE OTHER CAUSES WILL
4 NOT REMEDY IT.

5 **JUDGE HENDERSON:** WHY ISN'T IT A REASONABLE READING
6 THAT PLAINTIFFS -- I ASSUME THIS IS WHAT PLAINTIFFS HAVE DONE.
7 THAT, BOY, WE ARE NOT MAKING HEADWAY IN PLATA. WE ARE NOT
8 MAKING HEADWAY. JUDGE KARLTON HAS BEEN AT THIS FOR 12 YEARS.
9 WE THINK OVERCROWDING IS THE PRIMARY CAUSE OF OUR TAKING SO
10 LONG. WE ASK YOU TO CONVENE A THREE-JUDGE COURT. HERE WE ARE.

11 WHY ISN'T IT A REASONABLE READING OF THE PLRA TO SAY,
12 THREE-JUDGE COURT, HANDLE THAT PROBLEM. HANDLE THE PRIMARY
13 CAUSE IF YOU FIND IT TO BE SUCH AND THEN LET JUDGE KARLTON AND
14 JUDGE HENDERSON DEAL WITH THOSE OTHERS.

15 **JUDGE REINHARDT:** UNLESS, UNLESS THE STATUTE SAYS
16 THERE IS OTHER RELIEF THAT WILL REMEDY THE VIOLATION. IT
17 DOESN'T SAY REDUCE THE VIOLATION.

18 **MR. KAUFHOLD:** AND THAT IS THE ENTIRE ISSUE THAT WE
19 HAVE, YOUR HONOR.

20 AND, JUDGE HENDERSON, I THINK THIS GETS TO THE POINT
21 THAT YOU ARE MAKING. YOU CAN'T AUTOMATICALLY ASSUME -- EVEN IF
22 YOU ASSUME PRIMARY CAUSE, YOU CAN'T ASSUME THE ABSENCE OF AN
23 ALTERNATIVE OR THERE WOULD ONLY BE ONE PRONG OF THIS TEST. WE
24 CAN'T CONFLATE THE TWO AND WE DON'T KNOW WHETHER THESE
25 ALTERNATIVES WILL WORK UNTIL WE ADDRESS THEM.

1 **JUDGE KARLTON:** COUNSEL, WE DO KNOW. WE DO KNOW.
2 IT'S NOT LIKE -- YOU COME TO THE CASE NEW. I HAVE BEEN AT IT
3 12 YEARS OR WHATEVER IT IS, GOD KNOWS, AND JUDGE HENDERSON HAS
4 BEEN AT IT YEARS AND YEARS. WE HAVE MADE EVERY ORDER THAT A
5 HUMAN BEING CAN THINK OF, AND HERE WE ARE.

6 MY SPECIAL MASTER TELLS ME -- YOU KNOW, COMMON SENSE.
7 MY SPECIAL MASTER TELLS ME THAT WE ARE IN DANGER OF LOSING ALL
8 THE PROGRESS WE MADE ALL THESE YEARS. WHY? BECAUSE OF
9 OVERCROWDING. I MEAN, THAT'S THE END OF THIS FANTASY WORLD.
10 THERE IS A REAL WORLD OUT THERE.

11 YOU KNOW, ANYWAY, I WANT YOU TO ASSUME, SIR, THAT THE
12 COURT HAS NOT BEEN -- HASN'T BEEN ATTEMPTING EVERY OTHER
13 SOLUTION.

14 **MR. KAUFHOLD:** NOT AT ALL, YOUR HONOR, AND I THINK --
15 I CERTAINLY DON'T MEAN TO UNDERSTATE.

16 I THINK MAYBE THE ACCUSATION WOULD BE THAT WE'RE
17 OVERSTATING THE PROGRESS THAT'S BEEN MADE.

18 BUT COMING TO THE CASE AS SOMEONE NEW, TAKING A LOOK
19 AT THE RECORD AS IT STANDS, IT'S A RECORD OF PROGRESS AT THIS
20 POINT. AND OUR POINT IS, DON'T GO TO WHAT CONGRESS HAS SAID IS
21 THE LAST RESORT. IF THERE ARE -- AS COUNSEL HAS SAID, IF YOU
22 GRANT THE RELIEF THAT THEY HAVE ASKED FOR, WE WILL STILL HAVE A
23 HOST OF PROBLEMS.

24 OUR POINT, YOUR HONOR, IS SIMPLY LET'S ADDRESS THE
25 HOST OF OTHER THINGS FIRST. THAT'S WHAT CONGRESS INTENDED.

1 AND IF YOU BELIEVE THAT THAT'S ALREADY BEEN DONE AS BEST AS
2 POSSIBLY CAN, THEN I'M VERY PREPARED TO MOVE ON TO THE SECOND
3 POINT.

4 **JUDGE KARLTON:** MOVE ON TO THE SECOND POINT.

5 **JUDGE REINHARDT:** NOT FOR THAT REASON. NOT FOR THE
6 REASON YOU GAVE, BUT MOVE ON.

7 **MR. KAUFHOLD:** THAT'S MR. SPECTER, COUNSEL'S COMMENT,
8 THAT WE SHOULD SIMPLY ACCEPT THE 50- -- I BELIEVE IT'S 52,000
9 NUMBER AND THAT HE IS AGNOSTIC ABOUT HOW THAT TAKES PLACE.

10 **JUDGE REINHARDT:** I HAVE TO POINT OUT TO HIM HE IS
11 NOT AGNOSTIC IN WHAT HE SAYS.

12 **JUDGE KARLTON:** HE PRETENDS TO BE AGNOSTIC.

13 **JUDGE REINHARDT:** HE WANTS TO PARTICIPATE IN THE
14 SOLUTION, SO HE MUST HAVE SOME VIEW.

15 **MR. KAUFHOLD:** I WOULD THINK SO, TOO, YOUR HONORS.
16 AND IT'S CRITICALLY IMPORTANT TO OUR CLIENTS THAT TO THE EXTENT
17 THAT ANY RELIEF IS ORDERED, THAT IT BE NARROWLY TAILORED; THAT
18 IT BE VERY, VERY TARGETED, PREFERABLY THAT IT BE TARGETED TO
19 THE POINT OF CLASS MEMBERS AND NOT AT THE POPULATION AS A
20 WHOLE.

21 AND I THINK THAT THAT'S ANOTHER THING THAT THE
22 LITIGATION REFORM ACT REQUIRES, IS THAT WHATEVER RELIEF IS
23 CRAFTED BE VERY CAREFULLY TARGETED AT THE AFFECTED INDIVIDUALS
24 AND NOT WITH THE HOPE THAT IF WE TAKE 50,000 PEOPLE OUT OF THE
25 SYSTEM, THAT SOMEHOW IT WILL ALL IMPROVE.

1 **JUDGE REINHARDT:** HOW DO YOU TALK ABOUT THE AFFECTED
2 INDIVIDUALS? IF THE CASE ONLY WENT ON FOR EIGHT YEARS, FIFTEEN
3 YEARS, THOSE INDIVIDUAL CHANGE. THE PEOPLE WHO WERE ILL EIGHT
4 YEARS AGO HAVE EITHER DIED, BEEN RELEASED FROM PRISONS, A LOT
5 OF THEM. THERE'S ANOTHER GROUP WHO ARE NOW IN. THEY ARE NOT
6 INDIVIDUALS ANY MORE. THERE ARE MORE PEOPLE BECOMING ILL IN
7 THE PRISONS BECAUSE OF LACK OF CARE.

8 HOW DO YOU TERM THE CLASS? ISN'T IT A CONSTANTLY
9 CHANGING GROUP OF PEOPLE?

10 **MR. KAUFHOLD:** I THINK IT IS A CONSTANTLY CHANGING
11 GROUP, YOUR HONOR, BUT IT'S NOT NECESSARILY A FAST-SHIFTING
12 IMMEDIATELY CHANGING GROUP. OUR POINT IS --

13 **JUDGE REINHARDT:** THIS CASE ISN'T BEING RESOLVED
14 RAPIDLY. IT'S BEING RESOLVED ON AN AVERAGE OF 10 YEARS.

15 **MR. KAUFHOLD:** THAT'S TRUE, YOUR HONOR, AND SOME
16 FLOW -- I BELIEVE THAT'S A TERM THAT PLAINTIFFS' COUNSEL
17 USED -- IN AND OUT OF THE CLASS OVER THAT PERIOD OF TIME IS TO
18 BE EXPECTED.

19 OUR ONLY POINT IS THAT THE RELIEF THAT IS ORDERED
20 SHOULD BE TARGETED DIRECTLY AT THE AFFECTED INDIVIDUALS AND
21 THAT WAS THE POINT THAT I WANTED TO MAKE, YOUR HONOR.

22 **JUDGE HENDERSON:** EFFECT ON THE COUNTIES, IS THAT
23 WHAT YOU ARE SAYING?

24 **MR. KAUFHOLD:** WELL, I THINK IT WOULD BE GREAT IF
25 EVERYTHING COULD BE SOLVED WITHOUT IMPACTING THE COUNTIES, BUT,

1 FRANKLY, WE ARE HERE TALKING ABOUT TWO PLAINTIFF CLASSES, NOT
2 ABOUT THE COUNTIES.

3 **JUDGE REINHARDT:** THE POINT, AS I UNDERSTAND THIS
4 CASE -- SOMEBODY ELSE MENTIONED THIS, TOO. THE FACT THAT THE
5 PRISON IS OVERCROWDED -- ASSUME THAT THIS IS THE SOLUTION; THAT
6 THE OVERCROWDING HAS AN EFFECT ON PEOPLE IN THE PRISON WHO THEN
7 -- WHO HAVE HEALTH PROBLEMS.

8 NOW, IN ORDER TO AVOID THE HEALTH PROBLEMS WHICH ARE
9 CAUSED BY OVERCROWDING, YOU HAVE TO REDUCE THE OVERCROWDING.
10 AND THAT'S WHAT AFFECTS THE CLASS OF PEOPLE WHO BECOME ILL OR
11 ARE ILL.

12 **MR. KAUFHOLD:** I THINK THERE ARE TWO DIFFERENT THINGS
13 THERE, YOUR HONOR, AND IT DEPENDS.

14 IF YOU BELIEVE IT IS OVERCROWDING THAT IS THE DIRECT
15 CAUSE THAT'S MAKING PEOPLE SICK, I UNDERSTAND YOUR POINT.

16 IF THE POINT IS PEOPLE DEVELOP CHRONIC MEDICAL
17 PROBLEMS AND THEY DON'T GET SEEN QUICKLY ENOUGH OR THERE AREN'T
18 ENOUGH SPECIALISTS, THERE ARE DIFFERENT POSSIBILITIES. AND I
19 THINK IT DEPENDS ON WHETHER YOU BELIEVE THAT THE CONDITION
20 THEMSELVES ARE BEING CAUSED BY OVERCROWDING OR WHETHER YOU
21 BELIEVE OVERCROWDING IS PREVENTING PEOPLE FROM RECEIVING CARE
22 FOR THINGS THAT COULD --

23 **JUDGE KARLTON:** MAYBE BOTH.

24 **MR. KAUFHOLD:** IT COULD BE BOTH.

25 **JUDGE REINHARDT:** I DON'T SEE HOW YOU HAVE THIS

1 NARROW TAILORED LIMITED TO THE SPECIFIC PEOPLE.

2 I MEAN, I WOULD BE HAPPY TO CONSIDER THAT KIND OF
3 PROPOSAL IF I ONLY UNDERSTOOD HOW YOU CAN SEGREGATE THAT CLASS,
4 BECAUSE THE THEORY IS IT'S THE OVERCROWDING THAT'S CAUSING THE
5 FAILURE TO TREAT HEALTH PROBLEMS PROPERLY.

6 SO WHAT DO YOU DO BY SEGREGATING THE CLASS? HOW DOES
7 THAT AFFECT YOUR RESOLUTION OF THE PROBLEM IF IT'S CAUSED BY
8 OVERCROWDING?

9 **MR. KAUFHOLD:** I GUESS IT DEPENDS, YOUR HONOR, ON THE
10 EXTENT TO WHICH IT REALLY IS CAUSED BY OVERCROWDING, BUT ONE
11 THING WOULD BE TO DO SOME SORT OF SEGREGATION ALONG THE LINES
12 THAT COUNSEL MITCHELL SUGGESTED, TO HAVE SPECIALIZED FACILITIES
13 OF THE SORT THAT I BELIEVE JUDGE KARLTON WAS SPEAKING OF
14 EARLIER.

15 **JUDGE KARLTON:** YOU KNOW WHAT'S HAPPENED. THE
16 RECEIVER ON BEHALF OF BOTH THE PLATA CLASS AND THE COLEMAN
17 CLASS WANTS TO BUILD 10,000 BEDS. THE STATE SAID, FINE, WE
18 WILL GO RIGHT ALONG WITH THAT. AND IN THE MIDDLE OF THE TRIAL
19 THEY SAID, WE ARE NOT GOING TO DO THAT. AND NOW THEY SAY,
20 LET'S GET RID OF THE RECEIVER.

21 IT'S NOT LIKE -- IT'S NOT LIKE THESE SUGGESTIONS HAVE
22 NOT BEEN RAISED AND, INDEED, AT SOME POINT IDENTIFIED -- I
23 MEAN, ADOPTED. WE ARE FACED WITH THE FACT THAT THE STATE HAS
24 NOW INDICATED THEY ARE UNWILLING TO DO THAT.

25 **MR. KAUFHOLD:** AND I THINK THE ANSWER, YOUR HONOR, WE

1 ARE GOING TO HAVE SHORTLY FROM THE NINTH CIRCUIT. THE ONLY
2 THING THAT I WOULD ADD IS THAT WE ARE NOT A MONOLITHIC GROUP
3 NECESSARILY AND PEOPLE CAN HAVE DIFFERING OPINIONS ON THAT.

4 WE BELIEVE THAT BOTH THE RECEIVER AND SPECIAL MASTER
5 HAVE MADE A LOT OF PROGRESS. WE HAD CITY LEGISLATORS COME IN
6 AND TESTIFY THAT THAT WAS THEIR BELIEF.

7 SO I WOULD NOT WRITE OFF THAT POSSIBILITY, AND I
8 CERTAINLY WOULDN'T TRY TO FORETELL WHAT THE COURT WILL DECIDE
9 WITH RESPECT TO THE CONTINUANCE OF THE RECEIVER'S WORK.

10 **JUDGE KARLTON:** I UNDERSTAND WHAT YOU ARE SAYING. WE
11 HAVE GOT TO DECIDE -- WELL, ALL RIGHT.

12 **MR. KAUFHOLD:** MY ONLY POINT IS, YOUR HONOR, THERE IS
13 ADDITIONAL TIME TO SEE HOW THAT TURNS OUT, AND IT'S NOT LIKE
14 EIGHT JOINDERS DROPPED IN THE MAIL TO THAT MOTION. THAT'S WHAT
15 I'M SAYING.

16 **JUDGE REINHARDT:** AT SOME POINT I GUESS IF THE CASE
17 GOES ON LONG ENOUGH, YOU JUST HAVE TO DECIDE WHAT TO DO AND YOU
18 HAVE TO LOOK AT THE CURRENT CIRCUMSTANCES AT SOME POINT.

19 WE CAN'T SAY, WELL, WITHIN THE NEXT FIVE TO TEN YEARS
20 THE STATE WILL BUILD PRISONS BECAUSE WE ARE GOING TO ELECT A
21 LEADER FOR THEM.

22 AN ASIDE, BARAK OBAMA ISN'T AVAILABLE. SO WHERE IS
23 THIS NEXT MESSIAH GOING TO COME FROM? I KNOW SOME PEOPLE MAY
24 HAVE AN IDEA THAT THEY KNOW WHO HE IS, BUT WE'VE SEEN HIM
25 BEFORE.

1 SO DON'T KNOW WHO IT'S GOING TO BE. THERE ARE A LOT
2 OF PEOPLE WHO ARE INTERESTED, WHETHER THAT PRISON IS GOING TO
3 BE A LEADER OR NOT. AND I DON'T THINK WE CAN WAIT FOR THAT.

4 AND IF HE IS A LEADER, HOW IS HE GOING TO GET TO
5 LEGISLATURE ON BEHALF OF YOUR CLIENTS? THIS IS A DIFFICULT
6 SYSTEM, AND YOU WAIT AWHILE.

7 I THINK JUDGE KARLTON AND JUDGE HENDERSON WERE --
8 HAVE BEEN QUITE PATIENT AND REASONABLE AND THEN AT SOME POINT
9 YOU SAY, WELL, WE CAN'T SPECULATE AS TO WHETHER THE STATE IS
10 GOING TO BECOME REASONABLE. WHEN ARE THEY GOING TO ALLOW THE
11 LEGISLATURE TO KISS AND MAKE UP AND THROW THEIR ARMS AROUND
12 EACH OTHER AND MARCH OFF AND SAY MORE MONEY FOR PRISON?

13 **JUDGE KARLTON:** AND THE TRUTH IS, YOU KNOW -- I
14 MEAN, PART OF THE PROBLEM IS WE NOW ARE FACED WITH THIS
15 ECONOMIC CRISIS. AND I DON'T SEE ANYTHING SUGGESTING THAT
16 WE'RE GOING TO HAVE TONS OF MONEY TO SPEND ON THESE PROGRAMS
17 THAT THE COUNTIES URGE UPON US.

18 **MR. KAUFHOLD:** IT'S A VERY DIFFICULT PROBLEM.

19 THE ONE THING I JUST WOULD ADD, YOUR HONOR, IS WE
20 ACTUALLY DID TRY TO COME TOGETHER TWO YEARS AGO AND IT WORKED
21 AS FAR AS IT WENT UNTIL IT DIDN'T.

22 AND I CAN'T PROMISE YOU WHEN THAT EFFORT WILL BE
23 REINVIGORATED, OTHER THAN TO SAY THAT AS RECENTLY AS DECEMBER,
24 MY CLIENTS AND MANY OTHERS WERE IN THE TRENCHES TRYING AND
25 ACTUALLY PASSED WHAT IS -- THE TESTIMONY, THE SWORN TESTIMONY

1 BEFORE THIS COURT WAS THAT WAS THE LAST STEP TO REAL PROGRESS.
2 AND IT'S BEEN THWARTED, BUT IT DOESN'T MEAN THAT IT'S NOT BEING
3 ACTIVELY PURSUED IN GOOD FAITH.

4 **JUDGE KARLTON:** MAY I ASK YOU A QUESTION? AND IF YOU
5 HAVEN'T RESEARCHED IT, THAT'S PERFECTLY UNDERSTANDABLE.

6 DO YOU AGREE WITH THE PLAINTIFFS OR DEFENDANTS THAT
7 THIS COURT HAS THE POWER TO ORDER THE STATE TO SHARE ANY
8 SAVINGS THAT WOULD COME FROM A PRISONER RELEASE?

9 **MR. KAUFHOLD:** I HAVEN'T BRIEFED THAT, YOUR, HONOR
10 BUT MY PRELIMINARY THOUGHT WOULD BE IT DOESN'T SEEM LIKE THERE
11 ARE LIMITATIONS WITHIN THE PLRA OTHER THAN THOSE SPECIFICALLY
12 STATED, WHICH WERE THE TAXATION AND THE BUILDING OF PRISONS.

13 **JUDGE KARLTON:** IT'S NOT A STATUTORY QUESTION. IT'S
14 A CONSTITUTIONAL QUESTION.

15 **JUDGE REINHARDT:** I WOULD BE INTERESTED IN YOUR VIEW
16 WHEN YOU DO RESEARCH IT. YOU COME FROM A PRETTY GOOD FIRM.
17 YOU COULD PUT SOME GOOD PEOPLE TO WORK ON. I'M NOT AS SURE AS
18 JUDGE KARLTON THAT THERE IS A PROBLEM.

19 **MR. KAUFHOLD:** WE WOULD BE GLAD TO DO THAT, YOUR
20 HONOR.

21 **JUDGE REINHARDT:** WELL, I THINK WE MAY SEND YOU ALL
22 AN ORDER BECAUSE IT'S AN IMPORTANT PART FOR US TO KNOW WHAT WE
23 CAN DO.

24 AND WE HAVE HAD -- THE FEDERAL COURTS HAVE HAD
25 PROBLEMS WITH STATES BEFORE THAT RESISTED ALL KINDS OF FEDERAL

1 ORDERS. THEY ISSUED ORDERS THAT MADE THE STATES INTEGRATE THE
2 SCHOOLS EVEN THOUGH IT COST THEM MONEY. THERE ARE LOTS OF
3 THINGS THAT FEDERAL COURTS HAVE ORDERED STATES TO DO WHICH
4 REQUIRED THE EXPENDITURE OF FUNDS.

5 SO I'M NOT SO SURE WE HAVE A CONSTITUTIONAL
6 LIMITATION. AND OUR AUTHORITY TO SEE THE PROGRAMS WORK,
7 EVERYTHING COSTS MONEY. AND IF WE COULDN'T ORDER THE
8 EXPENDITURES OF FUNDS, FEDERAL COURTS COULDN'T TELL THE STATES
9 ANYTHING.

10 SO I WOULD REALLY BE INTERESTED IN YOUR VIEW. WE'LL
11 TALK ABOUT GETTING AN ORDER TO THE PARTIES TO GIVE US THEIR
12 VIEWS. I KNOW YOU'VE ALL GIVEN US PRELIMINARY VIEWS.

13 AND I APPRECIATE MR. MELLO CALLING OUR ATTENTION TO A
14 PARTICULAR CASE, BUT THAT DOESN'T NECESSARILY ANSWER THE
15 QUESTION.

16 SO WE WILL LET YOU LET YOU KNOW, BUT I THINK -- IT'S
17 CERTAINLY A GOOD QUESTION IN THIS CASE AS TO WHAT WE COULD DO
18 AND IT CERTAINLY WOULD BE A LOT NICER TO BE ABLE TO HAVE THE
19 COUNTIES HAVE SOME PROGRAMS TO TAKE OVER PART OF THE STATE'S
20 PROBLEM. SO YOU'LL PROBABLY HEAR FROM US ABOUT THAT, AND DO A
21 GOOD JOB.

22 **MR. KAUFHOLD:** THANK YOU FOR LETTING US PARTICIPATE,
23 YOUR HONORS.

24 **JUDGE REINHARDT:** THANK YOU. WE HAVE ENJOYED HAVING
25 YOU HERE. AND THAT TAKES CARE OF IT FOR THIS AFTERNOON.

1 TOMORROW MORNING WE WILL HAVE THE PLAINTIFFS' REBUTTAL.
2 (WHEREUPON AT 5:08 P.M. FURTHER PROCEEDINGS
3 IN THE ABOVE-ENTITLED CAUSE WAS ADJOURNED
4 UNTIL WEDNESDAY, FEBRUARY 3, 2009 AT 10:00 A.M.)

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I N D E X

	<u>PAGE</u>	<u>VOL.</u>
5 Closing Argument by Mr. Specter	2873	15
Closing Argument by Mr. Bien	2917	15
6 Closing Argument by Ms. Leonard	2943	15
Closing Argument by Mr. Mello	2946	15
7 Closing Argument by Ms. Tillman	2993	15
Closing Argument by Mr. Mitchell	3013	15
8 Closing Argument by Ms. Barlow	3037	15
Closing Argument by Ms. Woodward	3060	15
9 Closing Argument by Ms. Fuentes	3066	15
Closing Argument by Ms. Keck	3071	15
10 Closing Argument by Mr. Kaufhold	3082	15

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CERTIFICATE OF REPORTER

I, DEBRA L. PAS, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C 01-1351 MARCIANO PLATA VS ARNOLD SCHWARZENEGGER AND S-90-0520 RALPH COLEMAN VS ARNOLD SCHWARZENEGGER, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

/S/ DEBRA L. PAS

DEBRA L. PAS, CSR 11916, CRR, RMR, RPR

TUESDAY, FEBRUARY 3, 2009